APPENDIX.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1874.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JOSEPH MEEHAN,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petition for Writ of Certiorari Filed June 18, 1979.

Certiorari Granted October 1, 1979.

Table of Contents.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH

vs.

JOSEPH MEEHAN

Docket Entries.

1976		
August		
10		Bail reduced to $100,000. See record in No. 03795.
11	(1)	Indictment returned.
		Copy of indictment and notice of the finding of indictment sent to Chief Justice and Attorney General.
		Copy of indictment with notice of finding of indictment and that it would be entered forthwith on docket of this Court sent by Clerk to Sheriff for services on defendant in Common Jail.
13	(2)	Order of notice with return of service on defendant endorsed thereon by Sheriff filed.
19		Brought into Court — continued by order of Court to August 25, 1976 for

1976

August

hearing re: Counsel. Dwyer, J. — L. Dzygala, ADA — T. Foley, Court Reporter.

25 Brought into Court — indictment read. Pleads not guilty.

Court allows 30 days for filing special pleadings, all motions and grants leave to be heard thereon.

Court orders defendant examined by Court Clinic Psychiatrist September 21, 1976. Continued by order of Court to September 21, 1976 for Exam — Conference for October 6, 1976. Dwyer, J. — S. Hamlin, ADA — M. Kevill, Court Reporter — T. McManus, attorney for defendant.

September

27 Defendant not in Court — continued by order of Court to October 14, 1976 for hearing. Mason, J. — S. Hamlin, A. D. A. — E. Goldberg, Court Reporter.

October

12 (3) Psychiatric Report of Eugene J. Balcanoff, M. D., filed.

14 Brought into Court — continued by agreement to January 19, 1977 for trial. Mason, J. — S. Hamlin, A. D.

1976

October

14 A. — E. Goldberg, Court Reporter — N. McManus, attorney for defendant.

December

22 (4) Defendant files: Motion to Make Trial and Pre-trial Proceedings Subject to Gen. Laws Chap. 278, Sects. 33A to 33G;

(5) Motion to Inspect Photographs;

(6) Motion to Be Furnished With Statements Concerning Identification;

(7) Motion to Inspect Statements of Commonwealth Witnesses;

(8) Motion For Copy of Statements;

(9) Motion of the Defendant to Inspect Evidence;

(10) Motion to Inspect Exhibits Presented to the Grand Jury;

(11) Defendant's Motion to Be Furnished With Criminal Records and Probation Records;

(12) Motion of the Defendant For the Production of Police Department Reports;

(13) Motion of the Defendant to Be Furnished With Statements of Promises, Rewards or Inducements;

(14) Motion for List of Names and Addresses of Witnesses Who Were Summonsed to Testify Before the Grand Jury;

(15) Motion of the Defendant to Be Furnished With Autopsy Reports;

1976

December

22 (16) Motion to Be Furnished With Evidence Favorable to the Accused;

(17) Motion to Be Furnished With Names and Addresses of Commonwealth Witnesses;

(18) Motion of the Defendant For Inspection of Grand Jury Minutes.

1977

February

3 Brought into Court — Defendants statement re: trial date filed and allowed. Continued by order of Court to May 16, 1977 for trial — defendant not objecting thereto.

Mason, J. — S. Hamlin, A.D.A. — E. Goldberg, Court Reporter — D. Mills, attorney for defendant.

March

24 (19) Defendant's Motion to be furnished with tape recordings of conversations between the defendant and any other persons on June 10, 11 and 12, 1976, filed.

(20) Defendant's motion for late filing of motion to suppress and for late filing of motion to be furnished with tape recordings, etc. filed.

(21) Defendant's motion to suppress received but not filed in accordance with Rule 61.

1977

May

4 (22) Commonwealth files: Motion for disclosure of alibi or insanity defense;

(23) Motion for disclosure of names, addresses and birthdays of defense witnesses;

(24) Motion for blood test of defendant;

(25) Motion for a view;

9 Defendant not in Court. Lobby conference with S. Hamlin, A.D.A. present;

(26) Court, Good, J., allows motion to suppress to be filed.

It is reported by the Court, Good, J., that the following motions are allowed by agreement: Paper #4-11 inclusive, 13-18 inclusive; 20 and 21, Paper #22 to 25.

Relative to Paper #24 — order issued by the Court, Good, J.

Paper #12 — no action. Good, J. — S. Hamlin ADA.

16 (27) Defendant brought into Court — files: Motion for postponement;

(28) Motion requesting an order for the attendance of a witness in custody — writ of habeas corpus issued;

(29) Motion for sequestration of witnesses, allowed — hearing on motion #26; Good, J. — A. Hamlin, ADA — E. Lucas, Court Reporter — W. Hurley and D. Mill, attorneys for defendant.

17 Defendant brought into Court — hearing continues — all parties present.

1977

May

18 Defendant brought into Court — hearing continues — all parties present.

19 Defendant brought into Court — hearing continues. All parties present.

20 Defendant brought into Court — hearing continues.

23 Defendant brought into Court — hearing continues — arguments scheduled for May 27, 1977, @ 10:00 A.M. Good, J. — S. Hamlin, ADA — E. Lucas, Court Reporter — W. Hurley and D. Mill, attorneys for defendant.

June

1 Defendant brought into Court — hearing on arguments re: Motion to Suppress.

(30) Motion to amend existing motion to suppress filed by leave of Court.

At conclusion of arguments, motion taken under advisement. Good, J. — S. Hamlin, ADA — E. Lucas, Court Reporter — D. Mill, attorney for defendant.

August

8 (31) Good, J., Memorandum of decision with reference to motion to suppress evidence filed. (Notify attorney of record and A.D.A.)

1977

August

22 (32) Defendant's notice of exception, filed. (Good, J. and S. Hamlin, ADA, each notified).

26 (33) Motion for bail filed.

Brought into Court, hearing re: paper # 33, after hearing denied without prejudice.

Strogoff, DCJ — S. Hamlin, ADA — E. Taper, Court reporter — W. Hurley, attorney for defendant.

September

7 (34) Commonwealth's notice of appeal, filed.

(35) Attested copy of order of Supreme Judicial Court, Liacos, J., granting interlocutory appeal under General Laws, Chapter 278, section 28E from decision on defendant's motion to suppress as to Commonwealth's amended application and defendant's cross application for interlocutory appeal, and reporting said appeal to the full Court for hearing, filed.

(36) Attested copy of Commonwealth's motion for incorporation of transcript as part of the record in the application for interlocutory appeal, allowed by Liacos, J., Supreme Judicial Court, filed.

1977		
October		
6		Letter sent to Good, J. re: Court's order for preparation of transcripts
14		Court Good, J. orders 4 copies of the transcript of evidence be prepared: 2 copies for the Appeals Court, 1 copy for the District Attorney and 1 copy for the defendant at his own expense
	(37)	Order filed.
		Letter sent to Court Reporter E. Lucas, re: Court's order for preparation of transcripts.
		Request for designation of pleadings sent to Attorney of record and Assistant District Attorney.
December		
16		Second letter sent to Court Reporter E. Lucas re: Court's order for preparation of transcripts.
1978		
April		
14	(38)	Two copies of the transcript of the evidence delivered to clerk by E. Lucas Court Reporter. Court Reporter Certificate — filed.
		Written notice of the completion of the summary of record sent to Attorney of Record.
	(39)	Clerk's certificate — filed.
	(40)	Commonwealth's Assignment of Errors filed.
	(41)	Defendants Assignment of Errors filed.

SUPREME JUDICIAL COURT

No. 1487.

COMMONWEALTH

vs.

JOSEPH MEEHAN

Docket Entries.

6-22-78.	Transfer sua sponte from Appeals Court.
	Entered June 26, 1978
7-24-78.	Service of Brief for Commonwealth by Sandra Hamlin, A.D.A.
7-28-78.	Service of Brief (As To Issue Upon His Application) for Defendant by David A. Mills and Walter J. Hurley.
	Argued December 5, 1978 (L, B, CJ, K, A)
12- 6-78.	Commonwealth's motion to file exhibits not already before the Court.
12- 6-78.	Commonwealth's motion for incorporation by reference of Commonwealth's
	Memorandum of law in support of its application for interlocutory appeal.
12- 7-78.	Opposition of Defendant to Commonwealth's Motion for Incorporation By Reference of Com-

monwealth's Memorandum of Law in Support of Its Application for Interlocutory Appeal, filed by David A. Mills of Mills & Teague, 100 Federal Street, Boston 02110.

3-19-79. The order of the Superior Court is reversed in so far as it denied the defendant's motion to suppress the alleged mid-afternoon inculpatory statement; in all other respects it is affirmed. The case is remanded to the Superior Court for further proceedings consistent with the opinion.

Rescript March 19, 1979.
Reasons as on file.
Notice sent to counsel.

10- 1-79. Petition for writ of certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts granted by the Supreme Court of the United States No. 78-1874.

Indictment No. 03504.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of August, in the year of our Lord one thousand nine hundred and seventy-six.

The jurors of the Commonwealth of Massachusetts on their oath present that Joseph Meehan, on the eleventh day of June, in the year of our Lord one thousand nine hundred and seventy-six, did assault and beat one Maryann Birks, with intent to murder her, and by such assault and beating did kill and murder the said Maryann Birks.

A TRUE BILL.

SANDRA L. HAMLIN,
Assistant District Attorney.

WILLIAM J. CARNEY,
Foreman of the Grand Jury.

August 11, 1976. Returned into said Superior Court by the Grand Jurors and ordered to be filed.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH OF MASSACHUSETTS

v.

JOSEPH MEEHAN

Motion to Suppress.

Now comes Joseph D. Meehan who moves that this Court suppress as available evidence purported statements made by him while in the custody of detectives of the Boston Police Department on June 11, 1976.

The defendant further moves to suppress as available evidence two shoes (or sneakers) that were taken from him while in the custody of detectives of the Boston Police Department on June 11, 1976.

The defendant further moves to suppress as available evidence in this case a pair of pants which were seized at his home on June 11, 1976.

And, in support of this motion, the defendant submits, in accordance with Superior Court Rule 61, the affidavits annexed hereto.

Respectfully submitted,

WALTER J. HURLEY
22 Beacon Street
Boston, Massachusetts 02108
742-2420

AFFIDAVIT OF JOSEPH D. MEEHAN.

Now comes Joseph D. Meehan who makes the following affidavit in support of the Motion to Suppress which is submitted herewith:

1. My name is Joseph D. Meehan and I am presently at the Charles Street Jail in Boston.

2. In June of 1976 I resided with my mother and several brothers and sisters at 1559 River Street in Hyde Park.

3. On June 10, 1976, at approximately 9:00 P.M., I ingested approximately twenty tablets of Valium, and I believe that the size of the tablets was 5 milligram dosage.

4. On June 11, 1976, at approximately 8:30 A.M., I ingested three to four additional Valium tablets.

5. Between the hours of 6:00 P.M., and 11:00 P.M., on June 10, 1976, I drank approximately 12 containers of beer.

6. On June 11, 1976, at approximately 9:00 A.M., I was arrested by the Boston Police and taken into custody.

7. At the time I was arrested, the police told me that they would give me a ride to get my unemployment check.

8. I was taken to a police station and questioned without a lawyer being present. I do not remember all the questions or all the answers. I believe, however, that there were five, six or seven police officers present during the questioning. I further believe that the questioning lasted approximately 2½ hours.

9. At the time I was questioned I was unaware of the need for a lawyer or of my right to a lawyer and I was frightened.

10. I have read a transcript of the probable cause hearing in this case. It was brought to me by Attorney Mills and I have discussed it with Attorney Mills and with Attorney Hurley. I do not believe that I said the things that the police claim that I said during my questioning.

11. I do not believe that the police had a warrant for my arrest when they arrested me.

12. I do not believe that the police told me that I could have my mother, friends or a lawyer with me.

13. I believe that the police took one or two of my sneakers from me while I was at the police station.

JOSEPH D. MEEHAN

SUFFOLK, SS. DATE: March 17, 1977

Then personally appeared Joseph D. Meehan who made oath to the truth of the foregoing.

Before me,

DAVID A. MILLS
Notary Public

My Commission Expires:
8/18/83

AFFIDAVIT OF COUNSEL.

I, Walter J. Hurley, an attorney for Joseph D. Meehan, represent and aver that the discovery materials in this case, furnished by the Commonwealth, include a document which purports to be an inculpatory statement of admission made by Joseph D. Meehan on June 11, 1976, in Detectives Room, District No. 5, Boston Police Department, at 11:20 A.M.

Based upon conversation with the personnel of the office of the District Attorney for Suffolk County, I believe that the Commonwealth intends to offer this statement as evidence in this case.

WALTER J. HURLEY

Filed by leave of court (Good, J.) May 9, 1977.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH

vs.

JOSEPH MEEHAN

Motion to Amend Existing Motion to Suppress.

The defendant, by his counsel, moves this Court to allow amendment to the existing motion to suppress, by adding the following as a third paragraph thereof:

> The defendant moves to suppress as evidence against him a statement purportedly made by the defendant to his mother, in the presence of Detective Feeney, while in custody, between the approximate hours of 3:00 P.M. and 4:00 P.M. on June 11, 1976.

and, in further support of the motion to suppress the defendant states that he was deprived of the effective assistance of counsel, as appears of record from the testimony before this Court during hearing of the motion to suppress.

Respectfully,

/s/ WALTER J. HURLEY
22 Beacon Street
Boston, Ma. 02108
742-2420

Filed June 1, 1977 (Good, J.).

Exhibit 4.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. WEST ROXBURY DISTRICT COURT.

Affidavit in Support of Application for Search Warrant

G.L. c. 276, ss. 1 to 7; St. 1964, c. 557 As Amended

June 11, 1976

I, James J. Solari, being duly sworn, depose and say:
1. I am a Detective Boston Police Dept.
2. I have information based upon personel knowledge. About 5:54 A.M. June 11, 1976 Wm. D. Ford and J. Benedetti in the 5-7 car responded to a radio call to 40 Oak St.. Upon their arrival the officers found a white female lying face down on the front lawn of #40, with blood around her head and apparently dead. Dr. N. Brenner responded and pronounced the victim dead at 6:20 A.M., June 11, 1976. John Foley, 29 Eastern Ave., H.P. identified the victim as his daughter, one Mary Ann Foley, (Birks), 23 Yrs., 29 Eastern Ave., H.P., at 6:20 A.M.. Further investigation led to the questioning of one Clair Wild, 28 Yrs., 38 Oak St., H.P. who stated that she was awakened about 2:30 A.M. by a woman screeming. She further stated that she went to the front window of her home and observed a white male, slender build, long dark hair cut above his shoulders, neet looking, 5'8" to 5'10", wearing blue shirt with long sleeves rolled up short and fadded blue dungarees, walk from the approximate area of the body down oak St. in the direction of Maple St.. About three minutes later she stated she heard a woman screem and then heard a thump

type noise ("like a garage door hitting the ground.") again she went to the window and observed the same male walking away from the area of the body and walking on Oak St. in the direction of Pine St. Upon further investigation by detectives of Dist. #5 and Boston Homicide division revealed that the victim had been seen in the company of one Joseph D. Meehan, 1559 River St., H.P.. Joseph Meehan was brought to dist #5 for questioning and after being informed of his rights. About 1:00 P.M. after being place under arrest for the murder of Mary Ann Birks, Joseph D. Meehan stated to the investigating officers that he did in fact kill Mary Ann Birks and the pants that he was wearing at the time of the incident are now located at his home at 1559 River St.. I Detective James Solari while in West Roxbury Dist. Court and writing this affidavit was informed at 1:05 P.M. June 11, 1976 by Det. Sgt. James Feeney of Dist. #5 of the above confession and location of the pants.

3. Based upon the foregoing reliable information — and upon my personal knowledge and belief — and attached affidavits — there is probable cause to believe that the property hereinafter described — has been stolen — or is being concealed, etc. and may be found in the possession of Joseph D. Meehan at premises 1559 River St., H.P.

4. The property for which I seek the issuance of a search warrant is the following: one pair of fadded blue dungrees (mens)

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of 1559 River St. and two and one half story wood frame house with light green aluminum sideing and white trim. 1559 & 1557 being a side by side duplex with 1559 entrance to the left when facing the house from the street and directing that if such property or evidence or any part thereof be found that it be

seized and brought before the court; together with such other and further relief that the court may deem proper.

JAMES J. SOLARI

Then personally appeared the above named James J. Solari and made oath that the foregoing affidavit by him subscribed is true.

Before me this 11th day of June 1976

RICHARD F. FELL,
Assistant Clerk of Municipal Court

Exhibit 5.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. MUNICIPAL COURT OF THE WEST ROXBURY DISTRICT

Search Warrant.

TO THE SHERIFFS OF OUR SEVERAL COUNTIES, OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR SAID COMMONWEALTH:

Proof by affidavit having been made this day before Richard F. Fell, Assistant Clerk by James J. Solari that there is probable cause for believing that certain property has been stolen, embezzled, or obtained by false pretences — certain property is intended for use or has been used as the means of committing a crime — certain property has been concealed to prevent a crime from being discovered — certain property is unlawfully possessed or kept or concealed for an unlawful purpose.

WE THEREFORE COMMAND YOU in the daytime (or at any time of the day or night) to make an immediate search of 1559 River Street, Hyde Park, two and one half story wood frame house with light green aluminum siding and white trim, 1559 & 1557 being a side by side duplex with 1559 entrance to the left when facing house from street, Joseph D. Meehan, and of any person present who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for the following property: one pair of fadded blue dungrees (men's) and if you find any such property or any part thereof to bring it and the persons in whose

possession it is found before the Municipal Court of the West Roxbury District at 445 Arborway, Jamaica Plain, Massachusetts in said County and Commonwealth, as soon as it has been served and in any event not later than seven days of issuance thereof. (Officer to make return on reverse side)

Witness, Paul Murphy, Esquire, Justice, at said Court aforesaid, this 11th day of June in the year of our Lord one thousand nine hundred and seventy-six.

RICHARD F. FELL,
Assistant Clerk

RETURN OF OFFICER SERVING SEARCH WARRANT.

I received this search warrant July [*sic*] 11, 1976, and have executed it as follows:

On July [*sic*] 11, 1976, at 2:15 o'clock P.M., I searched the premises described in the warrant.

The following is an inventory of the property taken pursuant to the warrant: one pair men's blue jeans (bloodstained), one pair men's undershorts.

This inventory was made in the presence of Louis Russo and William Cannon.

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

JAMES J. SOLARI

Subscribed and sworn to before me this 15th day of June, 1976.

JOHN L. SCOLPONETI
Assistant Clerk

Exhibit 14.

[29] Friday, June 11, 1976
Detectives Room District # 5

11:20 A.M.

My name is Sgt. Kelley. I am from the Homicide Unit. With me is Det. Madden, also of the Homicide Unit, Sgt. Det. James Feeney and Det. Russo, both of District # 5, Boston Police Department.

Statement of Joseph Meehan.

Q. (Sgt. Kelley) We are investigating the death of a Maryann Birks. She is also known as Maryann Foley, her maiden name. You are, at this time under arrest, Robert — A. Robert?

Q. Your name Robert? A. No.

Q. What is your first name? A. Joe. Joseph.

Q. What is your last name? A. Meehan.

Q. How do you spell it? A. M E E H A N. I am under arrest?

Q. Yes? Where do you live? A. 1559 River Street, Hyde Park.

Q. How old are you? A. 18.

Q. What is your date of birth? A. 3/2/58.

Q. What apartment do you live in? A. It is not an apartment. It is a duplex.

Q. What floor do you live on? A. We own the whole half of the house.

Q. Up and down? A. Right.

Q. So more or less it is a single house up and down? A. It is two houses put together.

Q. Do you have a telephone there? A. Yes. 364-3655.

Q. Tell me, which side of the duplex do you live in? Looking at the front of your house? A. Left.

Q. Left hand side? A. Yes.

Q. That's 1559, right? Joe before I ask you any questions, I am going to inform you of your constitutional rights. I want you to listen carefully, and I want you to acknowledge each one as I read them. either "yes" or "no" that you understand them.

[30] Q. Before I ask you any questions, you must understand your rights. You have the right to remain silent. Do you understand that? A. Yea.

Q. Anything you say can be used against you in court? Do you understand that? A. Right.

Q. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the questioning. Do you understand that? A. Right.

Q. If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish. Do you understand that? A. Right.

Q. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to an attorney or lawyer. Do you understand that? A. Yes.

Q. Do you understand what I have read to you? A. Right.

Q. Are you willing to talk to me about Maryann Birks? A. Yes.

Q. Joe, Maryann Birks was found up in front of 40 Oak Street, here in Hyde Park, and she was found dead? We have reason to believe she came about her death as a result of violence? In our opinion, she was murdered? Do you know

Maryann Birks? A. No. Well she has been around. Everyone knows her, you know.

Q. Then you know her? Is that correct? A. Yea.

Q. How long have you known her around town? A. Oh, a couple of weeks.

Q. Just a couple of weeks? A. Yea, she comes in Charley's a lot.

Q. Is that Charley's Saloon? A. Charley's Bar, on River Street near the bridge.

Q. Have you seen her in that place? A. Yea.

Q. Did you ever talk with her? A. Yea.

Q. Did you ever go out with her? A. No.

Q. You never went out with her? When was the last time that you saw Maryann Birks? A. I think it was Tuesday.

Q. This is June 11th, Friday, and you are going back now to Tuesday, June 8th, right? That's three days ago, right? A. Yea?

[31] Q. Where did you see her? A. At the bar.

Q. At Charley's Bar on River Street? A. Right.

Q. What time was that that you saw her? A. Oh, 11:30.

Q. At night? A. Yea.

Q. Did you have an occasion to go out with her? A. No.

Q. Did you ever go out with her? A. No, she never turns me on.

Q. Huh? A. She never turns me on.

Q. Did you ever go out with her? A. No.

Q. You were never with her? A. No.

Q. At any time? A. Just to talk with her. That's all.

Q. Talk with her? When was the last time you talked to her? A. That Tuesday.

Q. That Tuesday? June 8th? A. Yea.

Q. Are you sure about the date and the time? A. Yea.

Q. I notice that you are wearing yellow sneakers, yellowish type sneakers? A. Right.

Q. And I observe there was blood on them. They have been tested, and we found blood on the sneakers. A. On one of them.

Q. On both sneakers, there were blood stains on them. On one it was heavier than the other. I don't recall which it was, the right or the left? Do you recall? You don't recall which one was stained more? Was there blood on that? Do you know? A. Yea, there is blood.

Q. If my memory serves me right, I think it was on the right sneaker it seemed to be penetrated with the blood as you said? Would you tell me how you received the blood on your sneakers? A. I got in a fight with George Quish.

Q. How do you spell George's last name. A. Q U I S H.

Q. What's his first name? A. George.

Q. When did you have a fight with George? A. I think it was Tuesday in the afternoon.

[32] Q. Tuesday, that would be June 8th? Is that right? Was this prior to meeting Maryann? A. No.

Q. Or afterwards? A. This was before.

Q. Before? A. Right.

Q. Was it during the early evening or the daytime? A. The daytime.

Q. Daytime? What time about? A. Say around 7:30.

Q. 7:30 that night, Tuesday, June 8th? A. Right.

Q. Where did it take place? A. Right down here at the new _____.

Q. Where is that located? A. Hyde Park and River.

Q. What was the fight over? A. A disagreement between — there was a fight between _____ and we were taking sides as to who started it, so me and him went at it.

Q. Did you receive any injuries as a result of the fight? A. Well I got a broken finger out of it.

Q. You have a broken finger? A. Yea.

Q. Can you bend it? A. That's it (indicating)

Q. Is it still sensitive and sore? A. Yea.

Q. As I look at it, it looks to be swelled up there, the little finger of your left hand? A. Right, it is broken. Well it was broken several times before. It is broke now and it will be broken again.

Q. Did you go to any hospital since last Tuesday, the 8th, as a result of this fight, to have your finger looked at? A. No.

Q. You didn't? Now I just had a chemist examine those sneakers. He examined the sneakers and found it to be human blood which you say you received in a fight with George Quish? A. Yes.

Q. And this was on June 8th, Tuesday? Today is Friday, June 11th? Is that right? It is eleven o'clock, 11:30 A.M. in the morning? As I can observe by looking at the sneaker, not being a chemist, that the blood is fresh, relatively fresh blood, and I made that statement to the chemist. He said "Yes, this blood is fresh" and [33] he made a test on it, and it is human blood. Do you understand me now? A. Yea.

Q. You understand that this is three days ago, and the blood is a lot fresher than — A. Well you know we went swimming up there yesterday, so the sneakers probably are still wet.

Q. No. It is fresh blood. I am not holding anything back. I am just telling you it is fresh blood? A. How could it be, 3 days ago?

Q. Now, do you wish to comment on that? That the blood is very fresh? and it is the opinion that it couldn't be that old? It must be relatively fresh within hours I would say? A. It couldn't be. Well the only reason it could be fresh is because I fell in the reservoir.

Q. When did you fall in the reservoir? A. Yesterday.

Q. Yesterday? Who were you with at the reservoir? A. Oh, a bunch of people. Everyone who hangs around here. Three car loads of kids.

Q. Mr. Meehan, in all fairness to you right now, you stated you have not seen Maryann since — the last time you saw her was on Tuesday, June 8th? Is that right? A. Yea.

Q. We have witnesses that have you together last night? A. I wasn't with her.

Q. Pardon me? A. I wasn't with her.

Q. You deny the fact that you were with her? A. Yea.

Q. Well we do have witnesses and in all fairness to you — I am not at liberty to disclose them right now.

Q. (Are they there right now. A. No, but we can get them in)

Q. Mr. Meehan, I have witnesses that saw you in the company of Maryann Birks, also known as Maryann Foley. Saw you on the church steps with Maryann last night around midnight? These are two separate witnesses that know you for several years. They know you, and they [34] are positively sure that it was you, so I feel that is the reason why you are in here. These witnesses are going to be confronted with you, and it is going to be — I know that they are reliable witnesses, and I have no reason to believe that they are lying. As a suggestion, I think that you should think it over and use your own discretion. It is kind of a serious matter, and I think the truth is the best thing at this time? I hope that you are aware that Maryann Birks is dead? Do you understand that? Have you been informed about that? But you are under arrest right now. I have read you your rights? A. Under arrest for what?

Q. For the death — Right now for the suspicious death of Maryann Birks? I know that I am expecting to hear from the Medical Examiner, Dr. Curtis, and there is no doubt in my mind that she come about her death as a result of violence. Consequently it is a murder? I am telling you that these witnesses did see you, and I can't say anything more than that? I just want you to realize that. A. Can I see who the witnesses are who identified me?

Q. I have no reason to hold them back, but I don't think it is incumbent upon me right now to do it. I am telling you this, and I am certainly not telling you on the tape machine here that I am lying. I wouldn't jeopardize myself. This is too serious a matter, but I do have witnesses. I will in time bring them before you, to be confronted with you. I can verify that by these officers, Sgt. Feeney and Det. Madden, that we have talked to these witnesses, and they told me you were with her, sitting on the steps. I am sure I am not fooling around. I am not trying to trap you in any shape or form? A. I was with her last night at the stairs, but then I left.

Q. Well that's what we want. We are trying to get to the bottom, and we are trying to get to the truth of the matter. Now what time did [35] you meet Maryann Birks? A. 11:30.

Q. About 11:30. That would be on Thursday night? A. Last night.

Q. Last night, June 10th? Where did you meet Maryann Birks? A. I think it was in Billy's Saloon. Yea Billy's Saloon.

Q. What time did you arrive at Billy's Saloon? A. Maybe eleven.

Q. About 11 o'clock? Did you go in there alone? A. Yea I went in there.

Q. Was Maryann Birks in there when you went in? A. Yea.

Q. She was in there? O.K. Did you sit with Maryann Birks at that time when you went in? A. Yea, she bought me a beer.

Q. She bought you a beer? A. Yea. Then I bought her one.

Q. What type of beer were you drinking, by the way? A. Schlitz.

Q. (I wasn't in Billy's Saloon) Were you sitting in a booth or sitting at the bar? A. Sitting in a booth.

Q. Sitting in a booth? Just you and Maryann? A. Yea.

Q. She bought you a beer, and you bought her a beer? A. Yea.

Q. How many beers did you have? A. Just two.

Q. Just two? One that she bought and one that you bought? How long did it take you to consume the both beers? A. Maybe 15 or 20 minutes.

Q. Would that be about 11:15, 11:30? A. After.

Q. Around that time? Did you and Maryann have a conversation while you were having the beer? A. Yea.

Q. What was the conversation you had with Maryann? A. Well it was over where we could get some pot.

Q. Get some pot? A. Yea, marijuana.

Q. Do you use it occasionally? A. Yea.

Q. Do you know if Maryann used it? A. Yea.

Q. On occasion. O.K. A. That's the reason why we went in there looking for some.

Q. You were in Charley's looking for some? A. Not Charley's Billy's.

Q. In Billy's? O.K. [36] A. There was no one in there really.

Q. How much money did you have on you? A. I had about a dollar.

Q. How much, do you know, did Maryann have on her? A. I don't know.

Q. Tell me, Joe, while we are on the subject, how were you dressed last night? A. I had on dungarees.

Q. You had on dungarees? Were they denim's? A. Right.

Q. How about a shirt? A. I was wearing a red BVD. You know the pocket type.

Q. You were wearing a shirt? A. Yea like a T shirt, with a pocket in it, and it is red.

Q. Did you wear those sneakers that you had on this morning? A. Yea.

Q. You had those on? When you were with Maryann Birks you had the same sneakers on? A. Yea.

Q. At any time, did you have your shirt off? A. No.

Q. You never took off the red T shirt? A. No.

Q. And you say you wore a T shirt? A. Yea.

Q. You are positive of that? A. Yea.

Q. So approximately what time did you leave Charley's? A. Billey's.

Q. What time did you leave Billey's? And you were in the company of Maryann? Right? A. Right.

Q. What time did you leave Billey's after you had the two beers? A. Oh it must have been around quarter of.

Q. You say quarter of 12? A. Uh huh.

Q. So where did you go from there? Up to the stairs.

Q. Up to the steps of the church? A. Uh huh.

Q. What did you do? Did you sit on the steps? A. Yea.

Q. Sat on the steps? What was the conversation? Was there anybody around when you sat on the steps? Nobody around? All right.

Q. Was Maryann sitting on your right or your left on the steps? A. I think it was my left.

Q. On your left? A. Yea.

[39] Q. Did you have your arm around her? A. No.

Q. At any time while you were sitting on the steps? A. No.

Q. You never had your arm around her? How long did you stay on the steps of the church? A. Oh, 15 or 20 minutes.

Q. Did you incidentally when you left Billey's Saloon, what door did you leave by? A. The rear.

Q. The rear door? And then through the alley? A. Yea.

Q. What was the conversation you had in the 15 or 20 minutes you were on the church steps with Maryann? A. About where we would get some pot.

Q. Did you talk? Was there anything else? A. No. I said I am not going to sit here. I am going home, and she said she was going home, so I went up the corner again.

Q. Did you and Maryann walk? Leave the steps and walk together? A. No she went up towards her way, and I went down towards the square.

Q. When you got off the church steps, which direction did Maryann go? A. (Indicating)

Q. Which street is that? Maple Street? She went up Maple Street towards Oak Street? A. Yea.

Q. Where did you go? A. I went down toward the square.

Q. You went the opposite direction? A. Yea, down to the square.

Q. Down to the square? Did you walk up Maple Street on the way to the square? A. Why should I?

Q. I don't know. I was just asking you if you went that way?

Q. Where did you go after you left Maryann? A. I went up to the train depot up there.

Q. Where? A. The train depot, on River Street there.

Q. What did you go up there for? A. To see if any kids were around.

Q. Did you see any kids around? A. No.

Q. You didn't meet anybody? A. No. Then I went home, when I found there was no one around.

[38] Q. What time did you arrive home? A. It must have been then about quarter of.

Q. About quarter of one? A. Maybe one. I didn't look at the clock.

Q. When you went in the house, did you see anybody? A. No. Everyone was sleeping.

Q. When you left Maryann at the church and you walked down toward the depot, toward the square, did you pass by Brigham's? A. Yea.

Q. Brigham's Ice Cream place? A. Yea.

Q. Was there anybody hanging around there? At that time? A. Not that I know of. I didn't see anyone.

Q. So what is the fair estimate of the time that you walked by Brigham's after you left Maryann? A. Maybe five minutes. I don't know. It doesn't take that long to get to the square.

Q. What time would you say that would be around? Some time around 12 o'clock? A little after 12? A. Yea, maybe.

Q. But there was nobody there you knew? A. No.

Q. There was nobody there in front of Brigham's? A. Oh maybe there might have been. I don't know. I didn't look.

Q. You didn't see anybody there? A. I didn't look.

Q. Joe, you realize the seriousness of this thing that you have been arrested for? You understand that? A. Yes.

Q. Now when you were with Maryann drinking beer and you went up to the church steps, what was Mary wearing? As far as clothing goes? What type of pants was she wearing to start off with? Was she wearing pants or a dress? A. I think pants.

Q. Pants? A. Yea.

Q. Light colored? A. I don't know. I didn't even notice.

Q. Do you recall what kind of shoes she was wearing? A. No.

Q. You don't recall any type of clothing she might have been wearing? A. No.

[39] Q. None? A. No.

Q. Did she have a handbag when you were with her? A. Yea I think so.

Q. What type of a handbag was it? If you recall? A. I don't know. One of those big ones.

Q. A big one? Do you recall the color? A. It might have been denim, like the dungarees. I don't know. Just a big, big thing.

Q. Is there anything else, Joe, that you would like to tell us? A. No.

Q. When you left Maryann Birks at the church, was she alone? A. Yea, I think so.

Q. You say she was heading home? A. That's where she said she was going.

Q. And was she heading in the direction of her home? A. I think so. I don't know where she lives. I don't know if she lives on Oak Street or Pine.

Q. Do you know where Easton Avenue is? A. Yes.

Q. Was she heading in that direction? As if she was going to Easton Avenue? A. Yea, she was going up Pine when I last saw her.

Q. Wait a minute now? A. I got whacked out last night.

Q. Where were you? Down at Downey's? A. (Voice in background) He was on downers.

Q. Downers? You were on pills? A. (Voice in background) This is one of the things we are asking you all right? This is one of things we are asking you?

Q. All right. You were on downers? And you were drinking beer with one of the downers? A. They were vallums.

Q. They are a form of a pill? A. Yea.

Q. So how many of those pills did you take — roughtly? A. About 15.

Q. Is that the usual amount that you take or is that a little excessive? A. They were five milligrams.

Q. Five milligrams? O.K. Then you had a few Schlitzs? In other words. [40] A. Up the corner I had a Schlitz.

Q. So then you were feeling pretty good then? You were high? A. Yea.

Q. Do you want to tell me what happened Joe? A. About what?

Q. About the pills and you met Maryann, as you said it before? You told me you didn't see her; now you tell me you were on the church steps with her? You admitted that, right? If you were high as a kite, are you trying to tell me that nothing happened between you and Mary? A. Yea.

Q. Are you sure of that? A. Yea.

Q. Well I don't know what to say to you, Joe? I told you all about what we had here. I told you about the witnesses, the door you went out. I don't know what more I can talk to you about?

Q. Joe somebody said to me that you wanted to ask me a question? Is there something you want to know?

Q. (Det. Madden) Well he did say "Suppose I tell you that I did it, you know, what bearing would that have on the case and what degree it would be." We have no control over that. We go in and present the facts. Anyway we are here to help.

Q. Joe, from what you tell me right here now I can't promise you anything. I can't say I am going to do this or I am going to do that. I can't do that because it is not within my providence, and I have no jurisdiction over anything like that. What I do in cases similar to this, I inform the court and anybody effective with the court, the District Attorney or anybody else, that the defendant, in the presence of Detective Madden, myself and Sergeant Feeney, that he was very co-operative, he told us the truth, he had a few things that weren't correct; he corrected himself on them, and he came out and he told us the whole truth. I can honestly say that he co-operated to the fullest. You realize the seriousness of it. What good it is going to do, to tell the truth, I can — the court is going to [41] be well aware of your truthfulness, but I can't say that you are going to get a break. I just can't do those things. I can tell you that the court, in the past experience, that the court looks

upon these cases, where a guy tells the truth, a lot better than when we have to prove it the hard way, and that's all I can tell you. I will bring it to the attention of your attorney, the District Attorney, the local court judge and right up the line, for whatever develops out of it. The fact is all I can promise you is that I will tell the truth and the fact that you co-operated, but I can't promise you anything. I can't put it any fairer than that. We co-operate with the attorney. Insofar as the defense attorneys go, we give them anything that they want and we discuss it with them openly and freely. We don't hold anything back. If you wish to tell the truth of what happened, then I can say in all fairness it would probably help your defense; in fact, I am sure it would. So I hope that explains it that I cannot promise you anything now. I don't intend to kid you by saying yes. I will get you this or get you that. I just can't say that. I can bring it to the attention of everybody concerned. When I say that, I mean the District Attorney, the Judge and everyone else. That's all I can do. So if you wish to tell me about it, I will listen, and I promise you what I would do. I will say that in the past it has helped, others in the past. I have been around for a few years, and I have had a little experience along these lines. One thing, don't get the impression I am trying to con you, because I am not. What else can I say. Anything else you want to know? A. Can I go home and get some clothes?

Q. We will see that the clothes come to you? No problem there? We will get you some clothes? Anything you request? We will get you the clothes, anything you want? If you were drinking — you told [42] me you were on those pills and everything else. I don't know what bearing that would have on it? Are you still — A. High from last night, a little jiggy.

Q. But you still understand me, don't you? A. Yea.

Q. You understand what I am talking about? That's the important thing. I don't want to be talking to someone who

doesn't know what is going on. I just want you to know the seriousness of it and what I said before. If you wish to tell the story, I am sure it will help you.

Q. Do you wish to tell me what the story was Joe? A. Yea, but if I tell you right, it is going to come out in the court.

Q. Joe it is going to come out in court eventually. It is going to come out through witnesses, through evidence, stuff like that? As I said before, we are not holding you here on a little thread of evidence. We have a good case here. I am no attorney. I am only a policeman, but we certainly have a case. As I said before, if there is anything more you want to add to it, and my suggestion is the truth is going to be a good defense in this particular case. So it is up to you Joe? A. I don't know.

Q. You don't know what? Is there some question you want to know? I wish I could promise you the world, but I can't. I am certainly not going to promise you something that I cannot fulfill just for the sake of this. This is serious; this is my job, and I wish I could, but I am certainly, like I told you before, I will spread the word. I will take the stand under oath and I have nothing to hide. I have had many a time that they ask me and the defense makes a pitch that my client was co-operative with the police — postively absolutely I would never deny that if that was the case. I have told you about the witnesses. I have told you about that; I wasn't hiding anything. I came out with it.

Q. Joe do you want to tell us about it? Did you say that she provoked you? Is that my understanding? A. Yea.

[43] Q. Will you tell us in your own words? A. I was high on the valiums and everything.

Q. What did you say again? A. High on the valiums and drunk, you know, a few 6 packs. You know she was making fun of me and everything and I flipped out, you know.

Q. Did you want to have intercourse with her? Was she kidding you about that part of it or what? A. Yea she said she would, but, you know —

Q. Did she want any money or anything? A. No.

Q. Well tell us what happened? When you left the church, did you go up Oak Street? A. Yea.

Q. Yea and were you looking for a spot to go to? A. Yea.

Q. Did you have any place in mind where to go or anyplace up on the street? A. Anyplace.

Q. But you did stop in front of #40? I don't know if you knew it was #40. It was on the grass lawn there, right? You know what I am talking about? At the side window, there is a grass lawn? Were you on the grass with her? A. Yea.

Q. Did you both sit down and lay down there or what? A. We were sitting down, you know, and she refused me, and I just flipped out?

Q. What did you ask her? A. Just sit down and did it on, you know. A. In other words, you wanted to get laid? A. Yea.

Q. What did she say to that? A. She said no.

Q. Were you upset about that? That you wanted to have intercourse? A. Yea.

Q. O.K. Then she refused you? Why did she refuse you? A. Oh, she said I was too young.

Q. She said you were too young? A. Yea.

[44] Q. So what did you do then? You say you flipped out? What did you do then? Did you strike her? A. Yea, I hit her.

Q. What did you hit her with? A. You know, I kicked her.

Q. Oh, you kicked her? And did you have those sneakers on that you had on earlier? You kicked her? Where did you kick her? In what part of the body? A. Kicked her in the head?

Q. Was she laying or sitting down on the grass at this time? A. Well when I kicked her, you know, I guess she was weary like dizzy so I just kept on kicking and kicking her. I didn't think I killed her.

Q. Kept on kicking her in the head? A. Yea.

Q. In the face? A. Yea.

Q. Was she unconscious after you kept — how many times do you think you kicked her? A. Oh, maybe several times.

Q. Several times? Would you say more than five times? A. Yea.

Q. Would it be more than ten times? A. No.

Q. Say between five and ten times, somewhere in that vicinity, over five but not ten? A. Yea.

Q. After you got through kicking her, what happened then? Was she unconscious? A. Yea.

Q. Prior to kicking her, did she make any outcry or yell at you, scream? A. No, because I figured she was unconscious.

Q. When you discovered that she was unconscious, Joe, what did you do then? A. I ran.

Q. You ran? Where did you go then? A. I ran home.

Q. Ran home? Tell me, Joe, did you have occasion to walk down Oak Street toward Maple and go into the yard of the Thomas Funeral Home? A. No.

Q. You didn't go in there? A. No.

Q. At any time, did you take a rock and throw it on her after you kicked her? A. Yea.

[45] Q. You did? O.K. Then you — A. Does that mean I am railroaded in now, then to be convicted and everything now?

Q. No? A. Why are you patting me on the back?

Q. (voice in background) Because you are telling the truth?

Q. Listen, did you go down to the Thomas Funeral Home and take the rock out of the lawn and go back again? Did

you? It was one of those rocks near the flower bed? And when you went back to her, was she unconscious at that time when you had the rock in your hand? A. Yea.

Q. Did you hit her with the rock at that time? A. Yea.

Q. How many times did you hit her with the rock? A. Just once.

Q. And when the rock hit her, what part of the body did the rock hit her? A. I don't know. I just threw it and split.

Q. Threw it and split, meaning "did you walk away." A. Yea, I ran.

Q. In what direction did you go? A. Down towards the church there — down to the square.

Q. Down towards the church? Down Oak Street? A. Yea.

Q. Towards Maple and down into the square? Right? What did you do after you left there? A. After I left the square?

Q. Yea? A. I went home.

Q. Did you change your clothes? A. No.

Q. Did you have a shirt on other than the one you told me about — the red shirt? A. Yea, I had this on. (indicating)

Q. You had this shirt on here? And is that the way you had it with the sleeves rolled up like that (indicating) A. Yea.

Q. But you had other pants on? Is that correct? A. Right, dungarees.

Q. Long dungarees? A. Yea.

Q. Where are those dungarees now? A. They are at home.

[46] Q. In what part of your home are they? Are they in your closet? A. Probably down with my weights, my weight lifting bench.

Q. Weight lifting bench? You took the pants off? Why did you change the pants? A. Because I was going to bed.

Q. Because you were going to bed? O.K. But those are the same sneakers you had on? Anything else, Sgt. Feeney?

Q. Is there anything else Joe that you wish to tell us, any more than what you have already told us? You were informed of your rights earlier? Is that correct? By the Detectives, also me? A. Yea.

Q. I told you whatever you told me in court, like including your rights, that you would be informed, that you voluntarily gave me the statement and told me the truth as to what happened. I told you that I would inform the court of that, and I intend to. In other words that you did this on a voluntary basis and the court would be informed of your truthfulness and that you came out and told us the story and the circumstances under which she died because of having intercourse with you she provoked you. (I think that's what you said) and that you flipped out? Is that what I think you said and that you kicked her several times, more than five, and that you then walked to the Thomas Funeral Home on the lawn and got a rock and came back and you threw it on her. You don't know where it hit her and then you took off down Maple Street — down Oak Street, past Maple, to the Square? Is that what you said? A. Yes.

Q. Did you have any sexual relations with her at any time at that time? Did you try to afterwards? A. No.

Q. Did you move or pull down any of her underclothes at any time? A. We did have intercourse.

Q. O.K. Was it before or after you kicked her? In other words, she resisted you and you forced her into intercourse? Is that what [47] you are trying to tell me? A. No I didn't force her.

Q. But you did have intercourse with her? A. Yea.

Q. Did you have it the normal way? A. Yea.

Q. Was she on her back or on her stomach? She was on her back at the time of the intercourse I assume? Right? A. Yea.

Q. This is a picture of the Thomas Funeral Home lawn, and that's where the brick is missing? We have the brick that was found up by the body of Maryann? Is that the location, if you recall? This is where you removed the brick? A. Yea.

Q. Then you carried it back to where she was lying? Right? A. Yea.

Q. Was the rock heavy? A. No it didn't seem heavy to me.

Q. But the rock I would say around ten inches by eight inches, eight inches wide? A. Well it was a rock.

Q. Well it wasn't a pebble by any means? In other words, it was a rock that you had to carry by two hands rather than one? With the weight of it, you wouldn't hold it in one hand for any distance, you know? A. Yea.

Q. Is there anything else, Sergeant? (Sgt. Feeney) Is it similar to them rocks? (indicating) A. Well it was dark, you know, maybe it was.

Q. This is what I am trying to figure? When you said you had intercourse with her, did you have intercourse after you kicked her? A. Gee I don't remember. I was so whacked out.

Q. You don't remembe. after you kicked her or after you hit her with the rock or before? You are not sure? A. I am not sure.

Q. In other words, it could have been after she was kicked and hit with the rock? A. No. I don't know. I was so messed up.

Q. You mean the pills make you messed up? You are not quite sure whether you had intercourse with her prior to kicking and hitting her with the rock or after?

[48] Q. O.K. You gave this voluntarily, this statement. This is the truth. Am I fair in saying that? A. Yea.

Q. You did this on your own voluntarily, and it is the truth? That's what I am trying to get? Am I right? A. Yea.

Q. You weren't promised anything? I didn't promise you any kind of a lighter sentence or anything else. I did say that I would bring this before the court of the fact that you did voluntarily tell the truth about this, that you didn't hold anything back.

Q. O.K. Thank you very much, Joe?

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH OF MASSACHUSETTS

v.

JOSEPH D. MEEHAN

Memorandum of Decision with Reference to Motion to Suppress Evidence.

1. On Friday, June 11, 1976, at about 6:30 A.M., there was found on the front lawn of 40 Oak Street, Hyde Park, the body of the victim, one Mary Ann Burkes, maiden name Mary Ann Foley. The deceased was found lying face-down with her white pants below her buttocks, her personal belongings including a large handbag being strewn on the ground near the body. The victim's head was covered by blood, and after the body was removed from the ground there was blood on the grass. A large rock was found near the body of the deceased and a photograph of this rock with blood on it, as well as the rock itself, were introduced into evidence.

2. The defendant filed a Motion to Suppress to which was appended an affidavit of the defendant Joseph D. Meehan, as well as an affidavit of Walter J. Hurley, Esq., counsel for the defendant. This Motion to Suppress and its appendages are incorporated by reference as part of this Memorandum of Decision.

3. I shall now deal with the specific questions which have been raised by the defendant by means of the Motion to Suppress. (A) *The arrest of the defendant*. I rule that the police had the requisite probable cause to arrest the defendant Joseph Meehan for murder, without a warrant, when the said defendant was at Station 5. I further rule that the defendant Joseph D. Meehan was not arrested while he was walking on Hyde Park Avenue at the time the police drove up to him and asked him to come to the station for questioning.

4. With reference to the above two rulings which I have just made, I make the following findings of fact on which I have based these findings.

5. When the police learned about the existence of this homicide in this case and after the body had been examined at 40 Oak Street, the police proceeded in the direction of initiating immediately an ongoing investigation. At the outset the investigation proceeded in two directions. The first aspect of the investigation was that the police undertook to make an inquiry of the neighbors who resided in the neighborhood of 40 Oak Street, the location at which was found the body of the deceased. Another aspect of this investigation was to undertake to learn who was in the area of Cleary Square on the evening of June 10th and the early morning of June 11th, and upon ascertaining the identity of these individuals to have them come to the station to be interviewed and questioned in order to see if they could assist in the progress of this investigation.

6. With reference to the interviews of the people who lived in the neighborhood of 40 Oak Street, several people were questioned by the police and this group included Clare Wilde, Mary Crowley, Nina Giardini, Eleanor Stella and Jean McCarthy, the daughter of Eleanor Stella. The witness Wilde, at about 2:00 or 2:30 A.M. on the morning of June 11th, was awakened by the sound of a barking dog, got up from bed and

heard a tapping noise. While she was looking out her second-story bedroom window, she saw a white male walk by her house in the direction of the Most Precious Blood Church. She described the white male as probably in his mid-twenties, about five feet ten, medium-slender build and about 150 pounds, having dark hair and wearing faded jeans and what appeared to be a long-sleeved shirt with the sleeves rolled up. She did not see the face of this man as he passed within her view. Three or four minutes later the man returned and she heard what she described as the sound of a large boulder. There was a bush on the lawn of 40 Oak Street which prevented her from seeing the body of the victim.

7. Another witness in the neighborhood was Mary Crowley, the mother of Clare Wilde, who heard a woman scream, "Don't. Please don't." She then heard dogs barking and a tapping noise.

8. At the same time, Officer Feeney was in charge of that aspect of the investigation which was designed to bring to the station young men, known to have been in Cleary Square during the evening of June 10, 1976, and early in the morning of June 11, 1976. The police effort in this direction was designed to get information concerning this crime. A number of young men were brought into the station, to wit: Joseph Ventola, Francis Hughes, John Carroll and Joseph Meehan. Another young man came in on his own initiative because he heard that the police were looking for him; namely, George Quish.

9. Ventola and Carroll came to the police station because the police sought them out, Ventola being at his place of employment and Carroll being at his home at the time the police contacted him. The police informed these two young men that the police were investigating an assault on a woman in Cleary Square on the night before and each one was being asked to accompany the police to the station in order to answer

questions. In addition, one Francis Hughes was also brought to the police station.

10. Ventola knew the victim because he saw her walking her dog near his place of employment, Cooper's Auto Body, Eastern Avenue, Hyde Park. He had seen the victim in the company of a young white male, around midnight, on the evening of June 10, 1976, sitting on the steps of the Christ Church. He described the white male as seventeen or eighteen years of age, "skinny," with blackish-brownish hair that came to about an inch below the ears and the male was wearing no shirt.

11. Carroll came to the police station and was interviewed in the Detectives' Room in the presence of Detective Solari. The Detectives' Room faces the front of the District 5 Police Headquarters on Hyde Park Avenue. Carroll had seen the victim, whom he had known at school, in the company of one Joseph Meehan whom he, Carroll, had known for six or seven years. The victim and Meehan were sitting on the steps of Christ Church between 11:30 P.M. and 12:00 midnight on the evening of June 10, 1976. As this interview was in progress, Carroll looked out the window of the Detectives' Room and remarked that an individual, thumbing a ride outside the police station at that time, was Joseph Meehan. Detective Solari immediately left the District 5 building by way of a window which was about four feet above the level of the sidewalk. Officer Cannon and Detective Russo left the building by the front door and Cannon got into an unmarked police car in front of the station, made a U-turn, and with Detective Solari in the vehicle proceeded up Hyde Park Avenue in the direction of Joseph Meehan. This car was used so that if Meehan were successful in hitching a ride, the officers intended to follow the car. Officer Russo walked up the sidewalk after Joseph Meehan.

12. Officers Solari and Cannon, in the police car, pulled up alongside Joseph Meehan and did not get out of the car, but Officer Cannon talked to the defendant. He told the defendant that the police were investigating an assault on a woman and they were questioning all the young men who were known to have been in the neighborhood the previous evening and they found out that Joseph Meehan had been there and asked him if he would come back to the station to be interveiwed. Meehan answered in the affirmative but indicated that he was on the way to the Unemployment Office in order to take care of an unemployment matter affecting him and Meehan was told that the police would drive him there if he were delayed. The defendant Meehan opened the rear door of the police car and climbed into the back seat, and Officer Russo got into the back seat with him and they all drove back to Station 5. This occurred at about 10:30 A.M.

13. The description of an individual which had been obtained from the persons on Oak Street was as follows: He was wearing blue dungarees, a blue shirt with a print on it, was eighteen to nineteen years old, was slim and no mention was made of his height. At the station observations of the defendant indicated that he was wearing cutoff dungarees, a blue shirt with the sleeves rolled up and a print on the shirt.

14. At the District 5 Headquarters, Solari sat down, facing Joseph Meehan, for the purpose of interviewing the defendant. At the same time Detective Cannon pursued his duties in connection with the investigation and then undertook to interview one George Quish who had come to the station because he had heard that the police wanted to talk to him.

15. When Solari sat down facing Meehan, he was about one and a half feet away from Meehan. The defendant sat down and crossed his legs and Detective Solari observed a rust-colored stain on Meehan's sneakers. The officer's experience suggested to him that this might well be blood and he asked

Meehan what was the stain on his sneakers. Meehan responded that it was probably mud from the pond in Dedham where he had been swimming the day before. Solari responded that the stain looked like blood to him and Meehan said that if it were blood, the blood belonged to George Quish because he had a fight with George Quish some time ago. Officer Solari asked Meehan if he could have his sneakers and Meehan took his left sneaker off and handed it to the officer. Immediately thereafter, the sneaker was subjected to chemical examination and tests by the Police Department chemist, one Stanley Bogden, and his tests indicated that the stain was blood. At the same time and inasmuch as Quish was then in the station being interviewed by Officer Cannon, Sergeant Feeney asked Officer Cannon to question Quish as to whether or not he had had a fight with anyone recently. Quish denied that he had had a fight but stated that the cut on his nose was as a result of falling down drunk some night a week before.

16. Thereupon, the defendant Joseph Meehan was placed under arrest.

17. I have recited these facts at some length in order to demonstrate that in my judgment the police had the requisite probable cause to arrest the defendant Joseph Meehan for murder and to do that without a warrant while at the police station. I find and rule that at the moment of his arrest, the arresting officer had knowledge of facts, based upon reasonably trustworthy information, sufficient to warrant him as a prudent man in believing that Meehan had committed this crime.

18. This recitation of facts also is designed to indicate that I came to the conclusion that when the police drove after Joseph Meehan on Hyde Park Avenue and asked him to come back to the station where the officers were questioning a group of young people who were known to have been in the Cleary Square vicinity on the evening of June 10 and the early morning of June 11, that the defendant voluntarily agreed to come back to the Police Headquarters at District 5 and was subjected to no restraint of any sort. For these reasons, then, I have ruled that the arrest of Joseph Meehan occurred at the District 5 Headquarters as stated above and that that arrest was based upon probable cause and therefore it was not necessary to obtain a warrant for his arrest. And for like reasons I have ruled that the defendant was not arrested in the course of the occurrences recited above on Hyde Park Avenue preceding the defendant's return to the District 5 Headquarters with the police in order to be interviewed. I rule, as well, that the arrest of Joseph Meehan as described above was a legal arrest and on that basis the arguments of the defendant which had been made and based upon the premise of an illegal arrest are no longer discussed by me in that they fail for the reasons stated above. In addition to the above, I rule that the activity which occurred on Hyde Park Avenue on the morning of June 11, 1976, with reference to the police car and the officers and Joseph Meehan were actions taken by the police in connection with an ongoing investigation and that at that time the defendant was asked to come back to District 5 Headquarters with all the other men who were known to have been in that vicinity on the evening of June 10 and the early morning of June 11, 1976. In addition, I find and rule that in any event Joseph Meehan voluntarily agreed to go back with the police to District 5 Headquarters in order to be interviewed with this group of young people which I have just described. I find that the defendant's liberty of movement had not become restricted by the action of the police, nor had he, in effect, submitted to the authority and control of the arresting officers, and for that reason he went with the police to District 5 Headquarters voluntarily.

19. (B) *The sneakers of the defendant.* In view of my rulings above and the facts recited above, I find and rule that the

defendant Meehan voluntarily turned over his sneakers to Detective Solari at the request of the latter. Indeed, I find and rule that the defendant was not in custody by way of arrest at the time the defendant voluntarily gave his sneakers to the detective. The defendant's counsel has theorized as to what would have happened if Meehan had declined or refused to return to Police Headquarters. The facts of this case, as I have found them, make such speculation immaterial and further discussion thereof unnecessary.

20. The fact that the police reacted with speed when Meehan's thumbing a ride on Hyde Park Avenue was brought to the attention of the police officers and the fact that the police cars were in the ready-to-use position, point to an efficient and alert police action, particularly as they were in the initial stages of investigating what appeared to be a brutal homicide which had just been brought to the attention of the police.

21. Of course the ordinary citizen is called upon to assist the police in connection with their investigation of a crime. It is the duty of every citizen to assist the police in that direction and up to the point of self-incrimination. When the police caught up with Meehan on Hyde Park Avenue, he was one of a group of young men who were known to have been in the Cleary Square vicinity on the evening of June 10 and the early morning of June 11, 1976, and who were being brought to District 5 Headquarters to be interviewed and possibly to render assistance with reference to this crime. I find that this was the posture of the defendant Meehan at that time.

22. (C) *The defendant's statement to the police.*

a. Was it voluntary?

b. Was there any violation of the Miranda rule, so-called?

23. I have already ruled that the arrest of the defendant in this case was a legal arrest, made upon probable cause in compliance with the law. Therefore, I do not deal with the de-

fendant's statement on the subject of inculpatory admissions on the basis of an illegal arrest, as has been argued in part by counsel for the defendant.

24. In dealing with these questions, I have considered the affidavit of Meehan as to the amount of Valium tablets he consumed during the evening of June 10 and on the early morning of June 11, 1976, (a total of twenty-four tablets) and he had consumed twelve cans of beer during the late evening of June 10th; I have considered, as well, the medical opinions of Dr. Sovner and Dr. Greenblatt as to the observable effects of the taking of such pills and beer: Such would leave a person with slurred speech, unsteady gait, drowsy and sleepy, and the memory and judgment of such person would be impaired. There was a difference of medical opinion as to when the peak effects of the Valium consumption would be reached and a discussion of the build-up of tolerance in a constant drug user: the manner in which the Miranda warnings, so-called, were given to the defendant Meehan and his responses thereto: the age, educational background and state of maturity of the defendant; and finally the nature and content of the entire transcript of the "questioning" of Meehan by Sergeant Kelly, as contained in Exhibit 14, Pages 29 to 48, inclusive.

25. On the basis of the above, I find and rule as follows:

A. The Commonwealth has not satisfied the burden of proving that the defendant waived his rights *intelligently, voluntarily* and *knowingly*. The defendant's one-word responses to each of the said warnings, indicate to me nothing more than that the Miranda warnings were recited to Meehan and he apparently heard them. I do not consider that this procedure, when it appears to have been done hurriedly and in the form of rote, is all that is required to constitute a waiver of these very vital rights of a defendant. The requirement that a waiver be made *intelligently, voluntarily* and *knowingly*.

requires something more than "Right," "Yes," and/or "I waive." For example, the Judge must be satisfied that such waivers were made "knowingly": It must appear in some way that a defendant knows what each right means with reference to him and the present charges against him; he must do something more than acknowledge the mere reading of each of these constitutional rights and give an affirmative statement such as "Yes" or "Right" to the query that he "understands that" which has been read to him. There is no statement that having understood the reading of his "rights" to him that the police are obligated to respect his insistence on his rights if he asserts his rights. And thereafter to finalize the cutoff from the defendant of his constitutional rights by means of the question: "Are you willing to talk to me about Mary Ann Burkes?" Answer: "Yes," and with the completeness and finality which the government asserts opens up the entire charge of murder and exposes the defendant to the serious and life-long consequences that would follow, is entirely too deadly an application of what is supposed to be a procedure whereby one can defend himself by silence against an almost overpowering set of circumstances. Such a rote reading of the "Miranda card rights" makes what appears to be the ultimate line of protection of an individual involved in the most serious problem of his life almost a mere platitude and the reducing of the giving of the Miranda warnings to a mere ritual. This Court is unable to infer that this eighteen-year-old defendant, with moderate and limited schooling, after riding off a night and morning Valium and beer experience, with a degree of hangover a matter of disagreement between the two doctor experts, with the dimness of his sense of judgment still hanging over him, was even aware of the significance of his rights, much less the significance of his waiver of these rights. And the fact that he knew his name and address, and where he lived, his age and telephone number, is hardly an adequate basis for saying

that the defendant should therefore be held to have intelligently, voluntarily and knowingly waived his priceless rights he enjoys by saying "Yes" to the question, "Are you willing to talk to me about Mary Ann Burkes?" For this question to constitute the key to this waiver is strange, because the wording of this question itself is peculiar. The Miranda warning does not prohibit talking about the victim, but about the crime committed upon the victim. A literal application of the government's standard of interpreting the effect of the defendant's responses of "Right" and "Yes," would suggest that his answer of "Yes" should limit his willingness to talk to Sergeant Kelly about Mary Ann Burkes, but not of the manner in which she met her death nor with reference to the crime of the homicide of the victim, each of which would appear to require a more appropriate and direct question and answer. A shallow interpretation of such rule as the Miranda warning requirement without some evidence that the defendant intelligently, voluntarily and knowingly "waived" these rights, is almost to say that there is no rule at all.

26. In addition, there is no evidence that the defendant was told that he could make a telephone call to his mother or anyone else. And the eighteen-year-old male, coming out of a bout with Valium and not being smart enough to ask for or even think of it, should have been given the opportunity to use the telephone.

27. I think, in addition, that the most telling aspect of the defendant's statement, with its confessions, etc., is a transcript of the questioning of the defendant itself. I make reference to Sergeant Kelly's routine recitation of the constitutional rights to the defendant on Pages 29 and 30; the defendant's one-word answers thereto; on Page 33, the defendant *wanted to see* the witnesses who said he was with the deceased on the church steps the previous night; Page 33 and 34, that there were two

separate witnesses who were stated to know Meehan for several years, that they are positively sure that it was Meehan and that is the reason you are in here; and there follows lines of ominous expressions, then a suggestion to think it over but Meehan was given no time to do so; then telling the defendant he is under arrest and a reference that the defendant had been given his rights, and the defendant's response was "Under arrest for what?"; the defendant asked again to see the witnesses who identified him. Then Sergeant Kelly adds "I am sure I am not fooling around. I am not trying to trap you in any shape or form"; then on Page 39 Sergeant Kelly asks "Is there anything else, Joe, you would like to tell us?" and the defendant Meehan's response was "No." And nevertheless Sergeant Kelly proceeded right along with the questioning, ignoring what had just been stated to him by the defendant; the defendant further told Sergeant Kelly that he "Got whacked out last night . . . on downers . . . Valium"; on Page 40, after Meehan denied anything happened between the victim and himself, there follows three statements by different police officers with no answers by the defendant. For example, just above the middle of the page on Page 40, the question: "Well, I don't know what to say to you, Joe. I told you all about what we have here. I told you about the witnesses, the door you went out. I don't know what more I can talk to you about." (No answer by the defendant.) The next statement in the transcript under question, "Joe, somebody said to me that you wanted to ask me a question. Is there something you want to know?" (No answer by the defendant.) Question: (Detective Madden) "Well, he did say, 'Suppose I tell you that I did it, you know, what bearing would that have on the case and what degree it would be.' We have no control over that. We go in and present the facts. Anyway, we are here to help." (No answer by the defendant.)

28. The next question appears to be a statement by Sergeant Kelly which begins at the lower third of Page 40, and goes down to the fifth line, inclusive, on Page 41. The next entry in the transcript on Page 41 under answer is the defendant's statement, "Can I go home and get some clothes?" And Sergeant Kelly's next question begins, "We will see that the clothes come to you. No problem there," etc.; going over to Page 42 of the transcript under the word question, "You told me you were on those pills and everything else. I don't know what bearing that would have on it. Are you still —", end of the question. The defendant Meehan responded "High from last night. A little jiggy." "But you still understand me, don't you?" Meehan's answer, "Yea." And when Sergeant Kelly asked, "Do you wish to tell me what the story was, Joe?" The defendant's answer, "Yea. But if I tell you, right, it is going to come out in the court?" Thereafter Sergeant Kelly makes a statement of how they have a good case and so forth, and Meehan's answer is, when Sergeant Kelly says "So it is up to you, Joe," his answer is "I don't know." And thereafter Sergeant Kelly begins the next paragraph with the statement, "You don't know what?" And then the transcript proceeds for eight or ten lines concluding that, "I have told you about the witnesses. I have told you about that. I wasn't hiding anything. I came out with it." On Page 45 the defendant Meehan's answer to the question "You did? Okay, then, you —", that being the end of the so-called question, Meehan's answering being "Does that mean I am railroaded in now, then to be convicted and everything now?" Sergeant Kelly's question, so-called, answers "No." And then the defendant Meehan said, "Why are you patting me on the back?" And the question (voice in the background) "Because you are telling the truth."

29. I have made these references to the statement of the defendant in the transcript in order to indicate that I came to

the conclusion that the defendant didn't really appreciate what was happending to him at that time and how much danger he was in at the hands of this very skillful police interrogation man. Sergeant Kelly indicated at different times that he was not trying to trick Meehan and he was not trying to con him, but I have come to the conclusion that the entire interrogation was very skillfully interwoven with long, many faceted statements, presumably supposed to have been in the form of a question and in these statements many different issues were referred to and raised, and in some instances the defendant merely responded "Yes" or "Yea." I find that Sergeant Kelly succeeded, and to use his own term, in trapping the defendant into making affirmative responses to questions, supposedly, which were so complex in form that an intelligent person would be incapable of knowing which aspect of Sergeant Kelly's statement the defendant Meehan was responding to. There were many references in the so-called statement of Meehan, as shown in the transcript, in which Sergeant Kelly was undertaking to create the appearance in the mind of Meehan that the Sergeant was a friend of his, was trying to help him, that if he admitted what he had done that it would assist him in his defense and in his case, and sprinkled throughout all these statements was the saving assertion that he couldn't promise him anything. In addition, when the defendant Meehan asked the several questions to which I made reference, Sergeant Kelly proceeded to brush right over them, particularly the statement in which Meehan was asked, as reflected on Page 39 of the transcript, "Is there anything else, Joe, that you would like to tell us?" and the defendant Meehan's answer was "No." At this point I rule that Sergeant Kelly was obligated under the rationale of the Miranda warning decision to halt immediately any further questions of this defendant. Sergeant Kelly proceeded to ignore that assertion and I have concluded that the defendant was incapable of competing with this type

of assault upon his mind and completely unprepared and incapable of asserting and insisting upon his rights under the Constitution. I find that Sergeant Kelly, in his very skillful and effective manner, completely overpowered the defendant Meehan so that he had no trouble at all in getting the defendant Meehan to agree to anything. The rationale of the Miranda warning decision is such as was designed to protect a young defendant, such as the defendant Meehan in this case.

30. I, therefore, have found by way of conclusion that the entire statement taken by Sergeant Kelly of the defendant Meehan is so infected with this overpowering broadside upon the defendant in very skillful police trained language that the statement by Meehan, in its entirety, should be stricken on the grounds that it was neither voluntary nor was it carried on with the principles of the Miranda case in mind. Therefore, the Motion to Suppress this statement is allowed in its entirety. In order that anyone making reference to this decision may have access to the interview of the defendant Meehan by Sergeant Kelly, I hereby incorporate by reference that part of Exhibit 14, beginning on Page 29 and concluding on Page 48. of that exhibit.

31. (D) *Miscellaneous.* There are other questions which have been raised by counsel for the defendant to which I shall make reference at this point. The defendant's counsel asserts that the defendant was denied effective assistance of counsel. There was no evidence that the defendant was informed that he was entitled to make a telephone call and, of course, I am unable to determine whether he would have called his mother or a lawyer. Nevertheless, the defendant's lawyer appeared on the scene at about 5:00 o'clock in the afternoon on June 11, 1976. After he talked to the defendant, he left at about 6:00 P.M. to take care of his Little League responsibilities and returned thereafter at about 11:00 P.M. Inasmuch as there is

no reference to the defendant attempting to call a lawyer or his mother or being denied this right, and at the same time there was no indication, as the government argues, that the defendant was discouraged concerning the question of a lawyer, I cannot impute to the police anything with reference to this particular aspect of the case and, therefore, I cannot rule that he was denied effective assistance of counsel. It appears that his lawyer wished to talk to the defendant and without the presence of a security officer, who is required under the Boston Police Department rules and regulations, to keep a prisoner such as the defendant who was in custody under his immediate control. The police officer informed the attorney that the rules of the Boston Police Department did not permit him to absent himself from the presence of the defendant or to remove himself so that he would not have a clear view of the defendant. I consider that to be an appropriate regulation of the Boston Police Department so that the security of a person who has been arrested on such a serious charge shall be maintained, particularly at this stage of the proceeding. I do not consider that to be an unreasonable regulation for the Boston Police Department to have, nor a position for the security officer himself to assert when the defendant's attorney wished to be left alone in District 5 with the defendant.

32. When the defendant's mother and his brother came to visit the defendant at District 5 Headquarters, there was some conversation between the defendant and his mother and brother. And I find that whatever statement was made spontaneously by the defendant to his mother, which was heard by a police officer, should not be suppressed for any reason presented by the defendant in this case. It is plain, and I so rule, that when a defendant makes a statement to his mother and/or brother or both of them such as has been claimed in this case and the questioning process has not been prompted or instituted by the police themselves, that when such statement

has been made and it is overheard by a police officer who is properly in the building and at the position he has assumed at the time, that such statement is not to be suppressed under those circumstances.

33. The defendant has raised, in addition, the question that when the defendant was at the police station his attorney requested a medical examination which would have included a blood test. There were no facilities for such an examination at that particular time at the District 5 Headquarters. And I rule that the failure to have a medical examination at that time and at that place does not constitute a deprivation of the defendant's rights under those circumstances. Counsel for the defendant has raised the question as to the validity of the warrant which the police obtained in order to get possession of the pants that the defendant was wearing at the time of the alleged incident. Inasmuch as the location of these pants was obtained as a result of the statement by the defendant to Sergeant Kelly which I have already suppressed, I rule that this warrant suffers by the same disability of illegality on that account and therefore the pants involved, as well as the underwear also obtained as a result of this warrant, are suppressed as well.

34. Therefore, with reference to the Motion to Suppress for the reasons stated in my Memorandum of Decision, the motion is allowed with reference to any statements of the defendant which appear in Exhibit 14, Pages 29 through 48, which is the statement of Joseph Meehan in its entirety as was obtained by Sergeant Kelly and which was dated Friday, June 11, 1976, and taken at 11:20 A.M. The defendant's motion to suppress the two sneakers, for reasons set out at length in my Memorandum of Decision, is hereby denied.

35. The defendant's motion to suppress the pair of pants which were seized at his home on June 11, 1976, for reasons set out in my Memorandum of Decision, is hereby allowed.

FRANCIS JOHN GOOD,
Justice, Superior Court.

Dated: August 5, 1977.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 77-367 CIVIL

COMMONWEALTH OF MASSACHUSETTS

vs.

JOSEPH MEEHAN

Order.

This matter came on to be heard upon the Commonwealth's amended application for interlocutory appeal from the allowance, in part, of a motion to suppress, and defendant's cross-application for interlocutory appeal under G.L. Ch. 278, § 28E, and was argued by counsel on September 21, 1977. It having been determined "that the administration of justice would be facilitated thereby" an interlocutory appeal from the decision of the Superior Court for Criminal Business for the County of Suffolk on the defendant's motion to suppress as to the Commonwealth's amended application and defendant's cross-application for interlocutory appeal is granted.

I herewith, without decision, report the appeal to the Full Court for hearing.

PAUL J. LIACOS,
Justice, Supreme Judicial Court

September 28, 1977

SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* JOSEPH MEEHAN.

Suffolk. December 5, 1978. — March 19, 1979.

Present: HENNESSEY, C.J., BRAUCHER, KAPLAN, LIACOS, & ABRAMS, JJ.

Constitutional Law, Admissions and confessions, Search and seizure, Waiver of constitutional rights. *Search and Seizure. Arrest. Waiver.*

Indictment found and returned in the Superior Court on August 11, 1976.

A motion to suppress evidence was heard by *Good*, J. Applications by the defendant and the Commonwealth for an interlocutory appeal were allowed by *Liacos*, J., and the appeal was reported by him.

Sandra Hamlin, Assistant District Attorney (*Paul A. Mishkin*, Special Assistant District Attorney, with her) for the Commonwealth.

Davis A. Mills (*Walter J. Hurley* with him) for the defendant.

KAPLAN, J. A Suffolk County grand jury handed down an indictment on August 11, 1976, charging the defendant Joseph Meehan with the murder of Maryann Birks. The defendant moved before trial to suppress inculpatory statements made by him as well as articles of clothing belonging to him. Extensive evidence was received on voir dire, including testimony from the defendant and medical testimony dealing with the extent to which the defendant's perceptive ability was impaired when he made the statements. The judge filed lengthy findings which grounded his order granting the motion in part and denying it in part. Thereupon the Commonwealth applied under G.L. c. 278, § 28E, for leave to take an interlocutory

appeal from so much of the order as granted suppression, and the defendant made a similar application with respect to the denial. A single justice of this court granted both applications, and we are thus required to review the several parts of the order. The order will be affirmed except for one feature which in our view merits reversal.[1]

Drawing on the findings and the underlying record, we state some of the facts at this point, reserving the rest for the later discussion of particular issues.

About 6 A.M., Friday, June 11, 1976, police officers found the victim's body on the front law of 40 Oak Street in the Hyde Park neighborhood. The face and head were covered with blood; a large rock found near the body was spotted with blood. Promptly the police attempted to interview individuals living near 40 Oak Street, or known to have been at the nearby Cleary Square (evidently a familiar gathering place) on the previous night.

Of the former group, Mary Crowley, interviewed at her home on 38 Oak Street, said that about 2 A.M. that morning she was awakened by a scream, dogs barking, and a tapping sound; she heard a woman scream, "Don't. Please don't," and then a wordless scream. Crowley's daughter, Claire Wilde, staying at the same address, gave a similar account and added that, looking out the window, she saw a white male walk by the house; he was about five feet ten inches, in his mid-twenties, had dark hair, and was slender; he was wearing faded jeans and his shirtsleeves were rolled up. Some minutes later the man returned and she heard what she described as the sound of a large boulder being thrown on the lawn. She

[1] The defendant has not briefed or argued certain assignments of error and they are considered waived. S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1974). See *Commonwealth* v. *Watkins*, Mass. , & n.2 (1978) (Mass. Adv. Sh. [1978] 1646, 1647, & n.2), and cases cited; Mass. R. A. P. 16, as amended, 367 Mass. 921 (1975).

did not see the man's face. The statements of these two witnesses were recorded on tape.

Also on the morning of June 11, four persons of the Cleary Square group were interviewed at District 5 police station on Hyde Park Avenue. Two gave material statements, also tape-recorded. Joseph Ventola, who knew the victim, said that around midnight he had driven past her; she was on the steps of Christ Church at 1220 River Street in the company of a white man, shirtless, in his late teens, "skinny," with dark hair. The second witness, John Carroll, said that between 11:30 P.M. and midnight he had driven by the victim and the defendant Joseph Meehan (both known to him); they were sitting on the steps of Christ Church; he described Meehan as eighteen or nineteen years old, five feet six, about 130 pounds, dark hair, wearing sneakers and a print shirt with rolled-up sleeves.

As Carroll was being interviewed about 10:30 A.M. in a first-floor room at the police station, he chanced, looking through the window near street level, to see the defendant trying to hitch a ride on Hyde Park Avenue and pointed him out to the police. Detective James Solari, one of the officers present, passed through the opened window to the street, while two other officers, William Cannon and Louis Russo, went by the front door. Russo walked up the street; Solari and Cannon proceeded in a police cruiser. The cruiser pulled up alongside the defendant. Cannon told him they were investigating an assault on a woman, were questioning those who had been seen in the area of the crime, and had been told that the defendant was there the previous evening. They asked the defendant to come with them to the station for an interview. The defendant said he was willing, but he was going to the unemployment office and did not want to be late. The officers answered they would drive him to the office if he should be delayed. The defendant opened the car door and took a rear

seat, where he was joined by the officer who had approached on foot. The defendant was eighteen, five feet six inches, 135 pounds, dark hair, wearing cut-off dungarees and a blue print shirt with rolled-up sleeves.

Officer Solari interviewed the defendant at the station. Sitting at a short distance from the defendant, Solari noticed reddish stains on the defendant's sneakers. In response to a question, the defendant said they were probably mud. When Solari said they appeared to be blood, the defendant said, if so, the stains were from a fight he had had several days earlier with George Quish. Solari asked whether he could inspect the sneakers. The defendant answered by removing the left sneaker and handing it to Solari. Leaving the defendant in the room, Solari took the sneakers and showed them to Sergeant James Feeney. Feeney agreed there were blood stains. It happened that Quish was being interviewed at the station at the same time. When asked by Sergeant Feeney whether he had been involved in a fight recently, Quish said he had not been. Feeney then instructed Solari to arrest the defendant and give him Miranda warnings, which evidently was done (there was no proof as to the manner of administering the warnings). A chemical test, made promptly, confirmed the visual judgment of blood.

About 11:20 A.M., the defendant was passed on to Sergeant Joseph Kelley (with Officers Feeney, Mark Madden, and Russo also present). Kelley gave the defendant Miranda warnings, and then followed an interrogation, interlarded with cajolings and assurances, which continued for perhaps an hour (almost all recorded on tape). Starting with his denial that he had been in the company of the victim on the night of the assault, the defendant was gradually brought around to admitting that he had kicked her, thrown a rock at her, and left her unconscious (as he thought) at the place where she was found. The circumstances of this confession were dealt with

by the judge in particular detail, and must be closely examined later in this opinion.

Mentioning the confession (and with some reference also to the statements of Claire Wilde and John Carroll previously given to the police), Officer Solari applied early that afternoon to the assistant clerk of the Municipal Court of the West Roxbury District for a warrant to search the defendant's house at 1559 River Street and recover the dungarees he was wearing (as mentioned during the confession) at the time of the alleged assault. The dungarees were in fact recovered under the warrant, as was a pair of undershorts found during the search.

The defendant's mother and brother, with Sergeant Feeney present, visited him at his cell at the District 5 station around 3:45 P.M. According to Feeney's testimony (which differed from that of the relatives), the defendant then uttered an incriminatory remark.

The judge after voir dire held (1) there was not an arrest on Hyde Park Avenue; (2) the sneakers should not be suppressed. (3) the confession should be suppressed, (4) with like consequence for the dungarees and undershorts; and (5) the statement to the mother and brother should not be suppressed. The cross-applications for interlocutory appeal followed.

In reviewing the judge's order we apply the standard recently stated, "that there is a presumption against waiver of constitutional rights, and, with regard to the attitude owed by the reviewing court to the trial judge who rules on a motion to suppress, that it is for that judge to resolve questions of credibility; that his subsidiary findings are to be respected if supported by the evidence; that his findings of ultimate fact deriving from the subsidiary findings are open to reexamination by this court, as are his conclusions of law, but, even so, that his conclusion as to waiver is entitled to substantial deference." *Commonwealth* v. *Doyle*, Mass. , n.6 (1970) [Mass. Adv. Sh. (1979) 168, 175 n.6]. Adhering to that

standard, we see no sufficient basis for interfering with the findings or conclusions of the judge below, except as to the statement to the mother and brother which, as matter of law, must be suppressed as the product of the original confession. We reverse that part of the order and affirm the rest.

1. *The arrest.* The defendant argues initially that he was arrested at 10:30 A.M. on Hyde Park Avenue, and that there was not probable cause for an arrest at that time. If the arrest was thus illegal, he maintains, it would infect the sequelae. The Commonwealth contends, and the judge found, that there was no arrest on Hyde Park Avenue, that an arrest did not take place until about 11:15 A.M., after the sneakers appeared on inspection to be bloodied and Quish had denied the fighting. The defendant does not challenge the judge's finding that there was sufficient cause for an arrest at that time.

The judge's conclusion that the defendant accompanied the officers voluntarily, and not under constraint, is well supported. It was put to the defendant that the police were engaged in a general inquiry and were seeking cooperation: the officers asked, did not demand, that the defendant come with them; the defendant opened the car door himself and entered the vehicle without compulsion;[2] the officers yielded to his convenience by promising to drive him to his destination if he lost time. Allowing for any implications arising from the police uniform itself, we think the case for the judge's inference of nonarrest is quite as strong as it was in such instances as *Commonwealth* v. *Cruz*, Mass. (1977) [Mass. Adv. Sh. (1977) 2395], and *Commonwealth* v. *Slaney*, 350 Mass. 400 (1966), where like conclusions were reached. The situation would have been clearer if the officers had told the defendant

[2]The defendant testified that Officer Russo "had his arm on my elbow, opened the door, put me in," but the judge accepted Officer Solari's testimony that the defendant opened the door and climbed into the car himself. Officer Solari also testified that there was no physical contact between the defendant and any of the officers.

that he was free to go on his way if he chose; but this punctilio cannot be insisted on here. See *Commonwealth* v. *Cruz*, *supra* at n.3 [Mass. Adv. Sh. (1977) at 2401 n.3].

The judge seemed to be appraising the defendant's own understanding of his situation (account being taken of the defendant's mental or psychological condition at the time),[3] but we need to add that, regardless of the defendant's inner reaction, there was no arrest for the present purpose if a reasonable person on the scene would not receive the impression that the defendant was being forcibly detained — unless, indeed, the officers had reason to understand that the defendant apprehended he was confronting force, and they then did nothing to disabuse his mind. See *United States* v. *Scheiblauer*, 472 F.2d 297, 301 (9th Cir. 1973); *Seals* v. *United States*, 325 F.2d 1006 (D.C. Cir. 1963). On this view, it also appears there was not an arrest. See *United States* v. *Chaffen*, 587 F.2d 920 (8th Cir. 1978); *United States* v. *Brunson*, 549 F.2d 348 (5th Cir.), cert. denied, 434 U.S. 842 (1977). We need not enter on a more refined subjective-objective analysis. See *State* v. *Kelly*, 376 A.2d 840 (Me. 1977); Model Code of Pre-Arraignment Procedure, Commentary to § 110.1 (1975); Cook, Subjective Attitudes of Arrestee and Arrestor as Affecting Occurrence of Arrest, 19 U. Kan. L. Rev. 173 (1971).

2. *The sneakers*. The judge ruled against suppression of the sneakers on the ground that the defendant surrendered them voluntarily to the officer. In a camera's eye, that is what happened. But the defense disputes a conclusion of consent. It presses a Fourth Amendment contention that, even if not in custody, the defendant was now in a coercive setting, with a tendentious question raised and unresolved — whether the

[3]There is no inconsistency between the judge's finding of voluntariness here and his finding, discussed below, that the defendant's condition of mind was one factor which, together with others arising later, rendered his confession involuntary.

stains were not in fact blood. See *Commonwealth* v. *Harmond*, Mass. , (1978) [Mass. Adv. Sh. (1978) 2773, 2779]. The defendant was not informed that he could withhold the sneakers. See *id.*; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973). Again there is the element of the defendant's mental condition at the time.

The judge's finding of voluntariness is supported, and his ruling should not be disturbed. However, another basis for the ruling is at hand. On a conventional interpretation, the articles were in "plain view," and so could have been taken in any event. For the officer, lawfully questioning the defendant, had a "legitimate reason for being present" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971); the evidence, an article appearing to be bloodstained, was "come by 'inadvertently'" or "without particular design" (*Commonwealth* v. *Bond*, Mass. , [1978]) [Mass. Adv. Sh. (1978) 1241, 1246]; and the officer could recognize it, in combination with the statements received, "to be plausibly related as proof to criminal activity of which [he was] already aware." *Id.* at [Mass. Adv. Sh. (1978) at 1247]. See *Commonwealth* v. *Moynihan*, Mass. (1978) [Mass. Adv. Sh. (1978) 2654]; *Harris* v. *United States*, 390 U.S. 234 (1968). This interpretation is in accord with decisions applying the plain view rule to the seizure without warrant of clothing or other material believed to be bloodstained and thus connected with a crime under investigation. See, e.g., *Commonwealth* v. *Perez*, 357 Mass. 290 (1970); *Smith* v. *Slayton*, 484 F.2d 1188 (4th Cir. 1973), cert. denied, 415 U.S. 924 (1974); *United States* v. *Sheard*, 473 F.2d 139 (D.C. Cir. 1972), cert. denied, 412 U.S. 943 (1973); *State* v. *Hardin*, 518 P.2d 151 (Nev. 1974); *State* v. *Rudd*, 49 N.J. 310 (1967). The case of *McCorquodale* v. *State*, 233 Ga. 369, 375 (1974), cert. denied, 428 U.S. 910 (1976), parallels our facts very closely. Professor LaFave might dispute whether, in strictness, the articles here, having not been come by in the course of a lawful search, were within

the sense of the "plain view" doctrine (W.R. LaFave, Search and Seizure § 2.2 at 240-248 [1978]), but the whole going situation was one where a requirement of procuring a warrant for the sneakers would seem extravagant. Cf. *Cupp* v. *Murphy*, 412 U.S. 291 (1973).

3. *The confession*. (a) *Content*. Sergeant Kelley started his interrogation by stating that the victim was dead and the defendant was under arrest. The defendant: "I am under arrest?" (And later: "Under arrest for what?") Kelley recited the Miranda warnings, asking the defendant to acknowledge each sentence as it was recited, which the defendant did by saying "yes" or "right." Then followed questions whether the defendant knew the victim. The defendant went as far as to say that he had spoken with her the previous Tuesday, but had not gone out with her.

Sergeant Kelley changed the subject to the sneakers and said they had been tested positively for blood. When the defendant tried again to account for this by referring to a fight with Quish on Tuesday, Kelley said the blood stains were fresh, made within hours, and scouted the defendant's attempted (and weak) explanations of how the stains could appear so although made on Tuesday.

Sergeant Kelley returned to the question of the defendant's acquaintance with the victim, and now said that they had been seen together on the church steps last night by two witnesses (not named): both witnesses, he said, were sure of the identification, reliable, and had known the defendant for several years. Kelley said it was not incumbent on him to show these witnesses to the defendant, but the defendant could confirm with Feeney and Madden that they had talked to the witnesses. (Kelley referred to the two witnesses at least seven times and later added, "we are not holding you here on a little thread of evidence. We have a good case here.") The defendant proceeded to admit he and the victim were together on the church stairs about midnight, but he said they had

parted shortly afterwards. He added that he had been "high" and "whacked out" on "downers" — fifteen Valium pills (on top of a "few 6-packs").

At this point, the interrogation seems to pause and take a turn with Madden reporting a question supposed to have been raised by the defendant: If he, the defendant, told them that he did it, "what bearing would that have on the case and what degree it would be?" Kelley went forward on two lines. On the "bearing" of a confession, he spoke at some length. He indicated a number of times that he could make no promises and would only be in a position to make it known to the court and the attorneys that the defendant had cooperated and finally told the truth, and "the court looks upon these cases, where a guy tells the truth, a lot better than when we have to prove it the hard way." But he went on to say: "If you wish to tell the truth of what happened, then I can say in all fairness it would probably help your defense; in fact, I am sure it would." "As I said before, if there is anything more you want to add to it, and my suggestion is the truth is going to be a good defense in this particular case." The second line Kelley took was to indicate there were extenuating factors: he laid stress on the fact of the defendant's drunken condition and, immediately after speaking of the "good defense," elicited from the defendant a "yes" answer to a leading question about the victim's "provoking" the defendant. The defendant first expressed doubt ("I don't know"), then answered questions, many of them leading, to the effect that he and the victim had gone to the Oak Street location where the victim had refused to have intercourse with him because (as she said) he was too young; that in his drunken state he had lost control and kicked her and found a stone nearby and threw it upon her; but he did have intercourse with her, whether before or after the beating, he could not remember. Finding her unconscious, he fled. After most of the story had been elicited, the defendant asked, "Does that

mean I am railroaded in now, then to be convicted and everything now?" Sergeant Kelley: "No."

(b) *Analysis.* The judge did not base himself on a single factor, but rather on the cumulative effect of several,[4] in finding the confession "involuntary," or — to speak more accurately — in finding that the Commonwealth had not carried the heavy burden of establishing that it was voluntary, see *Commonwealth* v. *Murray*, 359 Mass. 541, 546 (1971); *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966). The factors were: communication of incorrect information about the strength of the Commonwealth's case; assurance that the defense would benefit from a confession; defendant's unstable condition combined with his youth and inexperience; failure to inform the defendant he could telephone his family or friends.

(i) It was true that one witness, John Carroll, gave a statement that he saw the defendant and the victim sitting on the church steps on the fatal night and that he had known and recognized them both. There was, however, no second witness who gave a like statement. Officer Kelley had in fact interviewed both Carroll and Joseph Ventola and had heard Ventola say that he did not recognize the male sitting on the steps. Ventola's description of the male actually contradicted Carroll's statement in the matter of whether the male was wear-

[4] Referring to the factors of defendant's youth, inexperience, and psychological condition induced by his drug and alcohol intake, the judge doubted seriously the effectiveness of the waiver of Miranda rights, but in his apparent view (which we share) the decision is better rested on those and other factors which in combination rendered the confession involuntary. (As the judge noted, there is a place in the tape of the interrogation which may be open to the interpretation that, at a point before the most serious admissions, Sergeant Kelley went on to question the defendant although the defendant had indicated that that was all he wanted ["liked"] to say. See *Miranda* v. *Arizona*, 384 U.S. 436, 474 [1966]; *Commonwealth* v. *Mitchell*, 246 Pa. Super. Ct. 132, 136 n.3 [1977]. The interpretation is dubious and again we pass to the better foundation of decision.)

ing a shirt. Officer Kelley's statements, repeatedly bracketing two witnesses as having known the defendant for years and as giving direct, mutually reinforcing identifications, were deceptive. The more general remarks about the strength of the Commonwealth's "case" served still further to give the impression that the case against the defendant was already proved. Taken alone, the misinformation would not, we think, suffice to show "involuntariness" (see *Frazier* v. *Cupp*, 394 U.S. 731 [1969]; *United States ex rel. Hall* v. *Director, Dep't of Corrections of Ill.*, 578 F.2d 194 [7th Cir. 1978]), but the judge could view it as a relevant factor in considering whether the defendant's ability to make a free choice was undermined. See *Commonwealth* v. *Jackson*, Mass. , & n.8 (1979) [Mass. Adv. Sh. (1979) 401, 413 & n.8]; *United States ex rel. Everett* v. *Murphy*, 329 F.2d 68 (2d Cir.), cert. denied, 377 U.S. 967 (1964); *United States ex rel. Caminito* v. *Murphy*, 222 F.2d 698 (2d Cir. 1955); *Robinson* v. *Smith*, 451 F. Supp. 1278 (W.D.N.Y. 1978); Model Code of Pre-Arraignment Procedure, Commentary to § 140.4 (1975).

(ii) The judge could find that the police overstepped the permissible line in advising the defendant about the consequences a confession might have for the conduct of the defense.

An officer may suggest broadly that it would be "better" for a suspect to tell the truth,[5] may indicate that the person's cooperation would be brought to the attention of the public officials or others involved,[6] or may state in general terms that co-

[5] See *United States* v. *Barfield*, 507 F.2d 53 (5th Cir.), cert. denied, 421 U.S. 950 (1975); *State* v. *McLallen*, 522 S.W.2d 1 (Mo. 1975); *Bell* v. *State*, 258 Ark. 976 (1975); *Robinson* v. *State*, 229 Ga. 14 (1972); *Coursey* v. *State*, 457 S.W.2d 585 (Tex. Crim. App. 1970).

[6] See *United States* v. *Curtis*, 562 F.2d 1153, 1154 (9th Cir. 1977), cert. denied, 99 S. Ct. 279 (1978); *United States* v. *Frazier*, 434 F.2d 994 (5th Cir. 1970); *Fernandez-Delgado* v. *United States*, 368 F.2d 34 (9th Cir. 1966); *Burton* v. *Cox*, 312 F. Supp. 264 (W.D. Va. 1970); *People* v. *Hubbard*, 55 Ill. 2d 142 (1973).

operation has been considered favorably by the courts in the past.[7] What is prohibited, if a confession is to stand, is an assurance, express or implied, that it will aid the defense or result in a lesser sentence.[8]

Here the officer did emphasize that he could make no promises. But having said that, and uttered in addition the generalities about cooperation, he assured the defendant that a confession would "probably help your defense; in fact, I am sure it would." The further remark that "the truth is going to be a good defense in this particular case" goes further and carries an intimation that the defendant would be exonerated. Especially is this thought conveyed, when in the immediate background is the idea that a crime, if it was committed, would be palliated by the victim's "provocation" and by the defendant's inebriated condition at the time.

The law invoked here goes back many years. "No cases require more careful scrutiny," said this court in *Commonwealth* v. *Curtis*, 97 Mass. 574, 578 (1867), "than those of disclosures made by a party under arrest to the officer who has him in custody, and in none will slighter threats or promises of favor exclude the subsequent confessions." In that case the court excluded a confession given after an assurance by a police officer that "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence." For other expressions of the policy, see *Commonwealth* v. *Smith*, 119 Mass. 305 (1876); *Commonwealth* v. *Taylor*, 5 Cush. 605

[7] See *United States* v. *Reynolds*, 532 F.2d 1150 (7th Cir. 1976); *United States* v. *Glasgow*, 451 F.2d 557 (9th Cir. 1971); *Wallace* v. *State*, 290 Ala. 201 (1973).

[8] See *Bram* v. *United States*, 168 U.S. 532 (1897); *Grades* v. *Boles*, 398 F.2d 409 (4th Cir. 1968); *State* v. *Setzer*, 20 Wash. App. 48 (1978); *Bradley* v. *State*, 356 So.2d 849 (Fla. Dist. Ct. App. 1978); *State* v. *William*, 33 N.C. App. 624 (1977); *State* v. *Tardiff*, 374 A.2d 598 (Me. 1977); *Robinson* v. *State*, 229 Ga. 14 (1972); *Wallace* v. *State*, 290 Ala. 201 (1973); *State* v. *Castonguay*, 240 A.2d 747 (Me. 1968); *Lyter* v. *State*, 2 Md. App. 654 (1968); *State* v. *Fuqua*, 269 N.C. 223 (1967).

(1850); *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964); and for cases on either side of the line, compare *Bram* v. *United States*, 168 U.S. 532 (1897), and *State* v. *Pruitt*, 286 N.C. 442, 458 (1975), with *United States* v. *Williams*, 479 F.2d 1138 (4th Cir.), cert. denied, 414 U.S. 1025 (1973), and *United States* v. *Springer*, 460 F.2d 1344 (7th Cir.), cert. denied, 409 U.S. 873 (1972).

(iii) In the defendant's confession and affidavit on the motion to suppress, and his testimony and the testimony of others on voir dire, there was basis for questions to a medical expert called by the defense which led to the following opinion. If a person ingested ninety-five milligrams of Valium between 7:30 and 9 P.M. and between 7:30 and 11:30 P.M. drank twelve twelve-ounce bottles of beer,[9] there would be an impairment of memory, judgment, and intellectual function for at least six hours. At 11:30 the next morning, a wearing-off of the effects of the drug might be expected, "how much can't be said with certainty." If, in addition, twenty-five milligrams were taken at 10:20 A.M. that morning,[10] there would be at 11:20 A.M. "Some drowsiness, sedation, impairment of judgment and intellectual function." The same expert conceded that if a person took Valium once a week over a two-year period, some "tolerance would develop," but there was in fact no testimony that the defendant had been so regular a user. Expert testimony on the part of the Commonwealth was less suggestive of difficulties that the defendant might experience in

[9] In his affidavit the defendant stated that he took twenty five-milligram tablets of Valium at about 9 P.M. on June 10, drank about twelve containers of beer between 6 and 11 P.M. that evening, and about 8:30 A.M. on the following morning ingested an additional three or four Valium tablets. During the voir dire he added that he had smoked an unspecified quantity of marihuana on the evening of June 10.

[10] In fact the defendant said that he ingested Valium at about 8:30 A.M.; but the testimony as to the duration of the effects of the drug indicated that the one hour and fifty-minutes disparity would not make a material difference.

the morning. The defendant testified that he was dazed and confused and unable to remember much of the questioning by the police. Reading and listening to the tape of the Kelley interrogation, one finds strings of questions answered with monosyllables ("not reassuring explanations of his asserted comprehension," *Commonwealth* v. *Daniels*, 366 Mass. 601, 608 [1975]); confusion, too, in the defendant's questions about whether he was under arrest and whether he was to be "railroaded." Other answers were more forthcoming and involved some reasoning. The judge concluded that the defendant's judgment at that time was "dim" and "impaired." If it should be assumed that this condition would not alone justify suppression of the admissions (compare *Commonwealth* v. *White*, Mass. [1977] [Mass. Adv. Sh. (1977) 2805], aff'd by an equally divided court, U.S. [1978] [47 U.S.L.W. 4066 (Dec. 11, 1978)], with *Commonwealth* v. *Doyle*, Mass. [1979] [Mass. Adv. Sh. (1979) 168]), it would still be entitled to count in the judge's total assessment. See *Commonwealth* v. *Johnston*, Mass. (1977) [Mass. Adv. Sh. (1977) 1473]; *United States* v. *Grant*, 427 F. Supp. 45, 50 (S.D.N.Y. 1976).[11] So also the judge could give weight to the defendant's youth, inexperience, and limited schooling. See *Commonwealth* v. *Cain*, 361 Mass. 224, 228-229 (1972).

(iv) Especially in light of the defendant's youth, inexperience, and condition, a violation of G.L. c. 276, § 33A, as amended through St. 1963, c. 212, assumes importance. A person under arrest at a station with a telephone is entitled to be informed "forthwith upon his arrival . . . of his right to so use the telephone [i.e., to communicate with his family or friends], and such use shall be permitted within one hour thereafter." It has been held that unfavorable evidence, obtained as the result of an intentional deprival of the statutory

[11] See note 4 *supra*.

right, should be considered inadmissible and subject to suppression. *Commonwealth* v. *Jones*, 362 Mass. 497 (1972). We have not yet ordered suppression in a case where, although deprivation has occurred, it was not through proved intention; but we have lately again given warning of the importance of the statutory duty. See *Commonwealth* v. *Alicea*, Mass. , n.11 (1978) [Mass. Adv. Sh. (1978) 2707, 2711 n.11]. We agree with the judge that the failure affirmatively to comply with the statute is a factor in deciding whether a confession, vulnerable on other grounds, should be suppressed. Incidentally, it is clear, as will be seen below, that had the defendant called his mother or brother, they would have advised him not to speak to the police.

To conclude: The defendant, eighteen years of age, with a poor educational background, uninformed of his right to reach his family or friends, his judgment impaired through intoxication, confessed after being told that the case against him was established and after receiving assurance that the confession would assit his defense. We should not interfere with the judge's conclusion that the confession was involuntary and inadmissible.

4. *The dungarees.* When Officer Solari presented his application for the search warrant, the police were in possession of evidence probably sufficient, apart from the confession, to justify the issuance. The application, however, omitted mention of the crucial parts of this evidence, and the Commonwealth proceeds here on the assumption that the warrant rests on the confession. So the question is raised whether the warrant can legalize the seizure of the dungarees, when it is held that the confession must be suppressed. We agree that the answer is no, and this is explained simply on the ground that the confession was involuntary and thus directly offensive to the Fifth Amendment. See *United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890, 892-893 (7th Cir. 1976); *United States* v. *Mas-*

sey, 437 F. Supp. 843, 861-862 (M.D. Fla. 1977). Cf. *United States* v. *Castellana*, 488 F.2d 65 (5th Cir. 1974); *United States* v. *Cassell*, 452 F.2d 533, 541 (7th Cir. 1971). The conclusion follows from our recent decision of *Commonwealth* v. *White*, *supra* at - [Mass. Adv. Sh. (1977) at 2812-2813], where we suggested that the reasons for excluding the product of a warrant based on an inadmissible confession are surely no less persuasive than those for excluding material seized in pursuance of a warrant supported by an affidavit infected by evidence that has been unlawfully seized. See Model Code of Pre-Arraignment Procedure, Commentary to § 150.4 (1975).

There are cases in the Supreme Court suggesting that in certain circumstances evidence, secured as a result of a confession elicited by a violation of the prophylactic Miranda rule, need not be excluded on any constitutional ground. See *Michigan* v. *Tucker*, 417 U.S. 433 (1974). Cf. *Oregon* v. *Haas*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971) (the latter case was followed in *Commonwealth* v. *Harris*, 364 Mass. 236 [1973]). Those cases do not, however, reach the present, where the confession was involuntary. This distinction has been noted by the Court.[12] We add that our position here is

[12] In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), where the Court held that testimonial evidence need not be excluded because it was obtained as a result of a confession elicited in violation of Miranda, the confession "could hardly be termed involuntary." Thus "the police conduct . . . did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*." *Id.* at 444-445. See also *Oregon* v. *Haas*, 420 U.S. 714, 722 (1975); *Harris* v. *New York*, 401 U.S. 222, 224 (1971). After *Michigan* v. *Tucker*, some courts have expressed doubt as to whether physical evidence gathered as a result of a confession which is voluntary but obtained in violation of Miranda requirements must always be excluded as its "fruits." See *United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890, 894 n.3 (7th Cir. 1976); *Rhodes* v. *State*, 91 Nev. 17, 23 (1975). But see *Commonwealth* v. *Caso*, Mass. (1979) (Mass. Adv. Sh. [1979] 298); *United States* v. *Ceccolini*, 435 U.S. 268 (1978) (suggesting that

consistent with both the majority and minority views expressed in *Commonwealth* v. *Mahnke*, 368 Mass. 662 (1975), cert. denied. 425 U.S. 959 (1976).

5. *The afternoon statement.* News of the defendant's trouble did not reach his mother or brother until mid-afternoon. About 3:45 P.M. they arrived at the police station and were informed that the defendant had already confessed the crime. Sergeant Feeney and at least one other officer escorted the pair to the defendant's cell. Feeney testified that, as his visitors appeared, the defendant blurted out, "Ma, I didn't mean to hit her so hard." According to the defendant and his mother, he said only, "I'm sorry, ma." The mother and brother said loudly the defendant should say nothing to the police. The encounter was extremely emotional; the three were shouting at different points in the conversation.

In contending that any incriminating statement was consequent upon the involuntary confession and therefore similarly inadmissible, the defendant relied on the "cat out of the bag" analysis, which requires "the exclusion of a statement if, in giving the statement, the defendant was motivated by a belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements." *Commonwealth* v. *Mahnke*, *supra* at 686. See *Commonwealth* v. *Watkins*, Mass. , - (1978) [Mass. Adv. Sh. (1978) 1646, 1656-1661]; *United States* v. *Bayer*, 331 U.S. 532, 540 (1947). The judge below pointed to the following circumstances to show that the conditions of the statement were different from those of the confession and the two were thus independent: the statement was not prompted by police interrogation or made to the police (although police officers were with-

derivative physical evidence will less readily be admitted than derivative testimonial evidence).

in hearing), but was rather made to the family, and it appeared spontaneous.

Here we are obliged to hold that the judge committed error. His conclusion is not supported, and a contrary conclusion plainly is. The error actually derives from a misperception of the law.

It has been suggested that "there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first, and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time." *United States* v. *Gorman*, 355 F.2d 151, 157 (2d Cir. 1965), cert. denied, 384 U.S. 1024 (1966) (Friendly, J.). See *Brown* v. *Illinois*, 422 U.S. 590, 605 & n.12 (1975); *Darwin* v. *Connecticut*, 391 U.S. 346, 350-351 (1968) (Harlan, J., concurring in part and dissenting in part). The factors relied on by the judge were not themselves strong enough to provide "insulation," and in all events they were quite overcome by other circumstances. The statement was made a relatively short time after the confession, and at the same place; it was corroborative of the confession; there was no opportunity for consultation with family; although, as we have noted, there had been a statement that the confession would help the defendant or even free him in the end, we cannot say he had such confidence as would mark a "break in time or the stream of events" (see *Commonwealth* v. *Haas*, Mass. , [1977] [Mass. Adv. Sh. (1977) 2212, 2223]) sufficient to dissociate the statement from the confession. Cf. *Commonwealth* v. *Mahnke*, *supra*, 368 Mass. at 667. Nor do we think it may be assumed that remorse was so far at work as to provide the "break." See *id.* at 688 & n.31; *Copeland* v. *United States*, 343 F.2d 287, 291 & n.3 (D.C. Cir. 1964). Finally, the confession was rendered involuntary by police misconduct which cannot be termed inadvertent. Cf. *Knott* v. *Howard*, 378 F. Supp. 1325 (D.R.I. 1974), aff'd, 511 F.2d 1060 (1st Cir. 1975). The burden was on the Commonwealth to show circumstances insulating the statement from the confession, see *Brown* v. *Illinois*, *supra* at 604, and in this we think it must fail.

Our conclusion is in accord with other decisions requiring the suppression of an inculpatory statement which followed an inadmissible confession and which was not made in the course of police interrogation. See *Ricks* v. *United States*, 334 F.2d 964 (D.C. Cir. 1964); *State* v. *Paz*, 31 Ore. App. 851 (1977). Cf. *Copeland* v. *United States*, *supra* at 292 (Bazelon, C.J., concurring in part and dissenting in part); *Commonwealth* v. *Bordner*, 432 Pa. 405 (1968); *Soolook* v. *State*, 447 P.2d 55 (Alas. 1968), cert. denied, 396 U.S. 850 (1969).

6. *Conclusion*. The order of the Superior Court is reversed in so far as it denied the defendant's motion to suppress the alleged mid-afternoon inculpatory statement; in all other respects it is affirmed. The case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.